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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1945

No. 71

MINE SAFETY APPLIANCE COMPANY,
APPELLANT,

vs.

JAMES V. FORRESTAL, [redacted]

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

FILED MAY 12, 1945.

SUPREME COURT OF THE UNITED STATES

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APPELLANT,

vs.

JAMES V. FORRESTAL, ~~SECRETARY OF THE NAVY~~

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
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IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

Civil Action

File No. 23387

MINE SAFETY APPLIANCES COMPANY, a Corporation, 201 North Braddock Avenue, Pittsburgh, Pennsylvania, Plaintiff,

v.

FRANK KNOX, 4704 Linnean Avenue, Northwest, Washington, D. C.; James V. Forrestal, 1624 Twenty-ninth Street, Northwest, Washington, D. C., Defendants.

COMPLAINT FOR INJUNCTION AND OTHER RELIEF—Filed March 8, 1944.

1. Plaintiff, Mine Safety Appliances Company, is a corporation organized and existing under the laws of Pennsylvania with its principal place of business located at 201 North Braddock Avenue in the City of Pittsburgh, Commonwealth of Pennsylvania, and is a resident and citizen of Pennsylvania. Plaintiff has been since 1914, is now and was during the years 1941 and 1942, as well as at all other times hereinafter mentioned, engaged in the business of manufacturing, selling, and installing throughout the United States and for export, mining and industrial equipment and protective apparatus for the safeguarding of life and property.

2. As is hereinafter more fully set forth, the value of the rights which plaintiff in this suit seeks to protect and the value of the property and property rights and the extent of injury involved herein exceed $3,000, exclusive of interest and costs.

[fol. 2] 3. Defendant, Frank Knox, is a citizen of the United States and of the State of Illinois, a resident and inhabitant of the District of Columbia, and is the duly ap-

pointed and qualified Secretary of the Navy of the United States, and as such is charged with the duties of administering Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942 (Public Law 528, 77th Congress, Second Session, 56 Stat. 245, approved April 28, 1942), as amended by Section 801 of the Revenue Act of 1942 (Public Law 753, 77th Congress, Second Session, 56 Stat. 982, approved October 21, 1942), as further amended by Section 1 of the Military Appropriation Act for 1944 (Public Law 108, 78th Congress, First Session, 57 Stat. 348, approved July 1, 1943), as further amended by the Act of July 14, 1943 (Public Law 149, 78th Congress, First Session, 57 Stat. 564), said statute and amendments thereof being hereinafter referred to as the Renegotiation Act.

4. Defendant, James V. Forrestal, is a citizen of the United States and of the State of New York, a resident and inhabitant of the District of Columbia, and the duly appointed and qualified Under Secretary of the Navy of the United States, and as such he is also charged with the duty of administering the Renegotiation Act, by direction of and delegation by the aforesaid defendant Knox. With respect to the matters herein complained of, said defendant Forrestal has at all times purported to act by virtue of authority and discretion delegated to him by defendant Knox and has assumed to act for and represent the Secretary of the Navy, the Secretary of War, the Secretary of the Treasury, the Chairman of the Maritime Commission, the Administrator of the War Shipping Administration, and the respective Boards of Directors of Defense Plant Corporation, Metals Reserve Company, Defense Supplies Corporation and Rubber Reserve Company, by virtue of an authority delegated to him by these respective bodies.

[fol. 3] 5. At all times hereinafter mentioned, the "renegotiations" hereinafter referred to were conducted in the first instance by a Price Adjustment Board sitting in Washington, D. C., and subsequently, by a Price Adjustment Board sitting in New York City, which Boards were appointed or designated by defendants and are purporting to act by virtue of authority and discretion delegated to them by defendant Forrestal.

6. Plaintiff avers upon information and belief that the following orders and directives have been issued pursuant to the Renegotiation Act, Section 6(f):

a. Under date of April 29, 1942 and again under date of December 16, 1942, defendant Knox delegated the authority conferred upon him by the Renegotiation Act to the Under Secretary to make such further delegations of the authority delegated as he deems to be necessary.

b. Effective October 20, 1943, the Secretaries of War, Navy and Treasury, the Chairman of the Maritime Commission, the Administrator of the War Shipping Administration, and the Board of Directors of the Defense Plant Corporation, Metals Reserve Company, Defense Supplies Corporation and Rubber Reserve Company delegated to defendant Knox the authority and discretion conferred on them respectively by the Renegotiation Act to conduct renegotiations of the contract prices of contractors having contracts with their agencies.

c. Under date of June 22, 1943, defendant Forrestal established among others a Price Adjustment Board with divisions in New York and Washington and redelegated the authority conferred by the Renegotiation Act to said Price Adjustment Board.

7. This suit arises under the Constitution and Laws of the United States and plaintiff seeks primarily injunctive relief to suspend and restrain the enforcement, operation and execution of the Renegotiation Act and the unilateral determination by defendant Forrestal hereinafter referred [fol. 4] to, made thereunder on the ground that said Act is repugnant to the Constitution of the United States and that the unilateral determination thereunder is illegal and void. Plaintiff seeks to have this Honorable Court enjoin and restrain the defendants above named and each of them and anyone acting under them from enforcing or further proceeding under a unilateral determination promulgated under date of March 4th, 1944, by said defendant Forrestal, who is purporting to act under the authority of said Renegotiation Act. As will appear therefrom, said unilateral

determination is an affirmance of the determination of the Price Adjustment Board (New York Division) entered on January 4th, 1944. The determination of said Board is as follows:

"Navy Department
Price Adjustment Board
630 Fifth Avenue, New York 20, N. Y.

19 January 1944.

Mine Safety Appliances Company, Braddock, Thomas and Meade Streets, Pittsburgh, Pa.

Attention: Mr. John F. Beggy, Vice President

GENTLEMEN:

At a meeting held on January 17, 1944, the Board considered the memorandum dated January 12, 1944, signed by Mr. John F. Beggy, Vice President, and considered all of the other factors involved in the case. At this meeting the Board confirmed its previous determination that the Company had realized excessive profits of $550,000 for the year ended December 31, 1941, and excessive profits of $4,400,000 for the year ended December 31, 1942.

The Board has instructed me to inform you that the matter is being referred to the Under Secretary of the Navy for appropriate action.

Very truly yours, (S.) Joseph T. Owens, Lieut., U. S. N. R., Secretary, New York Division, Price Adjustment Board."

Plaintiff is unable to plead the memorandum dated Jan- [fol. 5] uary 12, 1944, referred to in the above quoted determination, by reason of the prohibitions against disclosure of secret, confidential or restricted matter as found in the statutes and executive orders governing the same.

8. The aforesaid unilateral determination of defendant Forrestal, purportedly made under the authority of said

Renegotiation Act, as received by Plaintiff, is in words and figures as follows:

"The Under Secretary of the Navy
Washington

March 4, 1944.

Mine Safety Appliances Company, Pittsburgh, Pennsylvania.

Subject: Renegotiation Pursuant to Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, as amended, for the fiscal years ended December 31, 1941 and December 31, 1942.

GENTLEMEN:

Renegotiation with respect to your contracts and subcontracts within the meaning of Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, as amended, has been conducted between you and the Secretary of the Navy or his duly authorized representative or representatives. In connection with such renegotiation there were submitted by you or obtained from governmental or other reliable sources certain financial, operating and other data relating to your circumstances and operations and to the profits realized by you during your fiscal years ending December 31, 1941, and December 31, 1942, under such contracts and subcontracts. You have been afforded full opportunity, at hearings of which due notice was given and which you attended, to submit such additional information and to present such contentions as you deemed material to a determination whether any, and if so, what part, of such profits is excessive.

Due consideration has been given to all of such financial, operating and other data and information so furnished or obtained, to each of the contentions so presented, and to all applicable factors pertinent to a determination of the existence and amount of excessive profits realized by you under such contracts and subcontracts for such periods. Such renegotiation has now been concluded and you have declined to enter into an agreement for the elimination of excessive profits realized during such periods from such contracts and subcontracts.

Accordingly, pursuant to authority under the provisions of Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, as amended, duly delegated to me under subsection (f) of said Section 403, I hereby find and determine that, after allowance as costs of the portion of all expenses reported by Mine Safety Appliances Company for such periods, allocable to such contracts and subcontracts, excessive profits in the amount of $550,000 for the fiscal year ended December 31, 1941, and $4,400,000 for the fiscal year ended December 31, 1942, were realized by Mine Safety Appliances Company during such fiscal years from such contracts and subcontracts, plus the amount of any re-
[fol. 6] fund or credit received by, or reduction in liability of, Mine Safety Appliances Company for (a) state or other taxes (exclusive of Federal taxes) measured by income, or (b) royalties, license fees, commissions or other charges or costs, reported as an expense by Mine Safety Appliances Company for such periods, to the intent that such refund, credit or reduction in liability shall result from the elimination of said amounts of excessive profits from gross sales and from income of Mine Safety Appliances Company for such periods.

Unless action is taken by you not later than March 8, 1944, to eliminate said excessive profits in a manner satisfactory to me, appropriate action will be taken by me, without further notice to you, to eliminate said amount of excessive profits (after allowance thereagainst of the tax credit provided by Section 3806 of the Internal Revenue Code) by directing the withholding of amounts otherwise due to you as a contractor or subcontractor by the Government and by contractors, within the meaning of said Section 403.

Very truly yours, (S.) James Forrestal."

9. Plaintiff avers that the aforesaid unilateral determination included the total of plaintiff's claimed renegotiable contracts for the years 1941 and 1942 without regard to whether each contract or purchase order involved $100,000 as said statute requires. Plaintiff avers that said unilateral determination is in this regard directly contrary to the provisions of said statute.

10. Plaintiff is the pioneer in the creation, development, and manufacture of safety equipment and protective ap-

paratus used in mining and industrial operations. Most of the products manufactured by plaintiff under normal conditions are its standard products and have a wide application in commercial and industrial fields. Under existing conditions, many of these products have been adapted to military purposes and plaintiff has contracts with virtually all of the government agencies.

11. Plaintiff has performed extensive and expensive research and developmental work but has kept as secret the results whenever requested to do so by the United States. Some of the items that plaintiff could have readily sold commercially as early as 1935 have been produced, at the request of our government, secretly and exclusively for our armed forces. If plaintiff had made these items available commercially, it would have given plaintiff a material advantage over its competitors and would have substantially redounded to its financial benefit.

[fol. 7] 12. Since 1935, directly and indirectly, plaintiff has made concessions to the government in addition to holding some of its products for the exclusive use of the government as aforesaid. Plaintiff avers that on contracts entered into beginning in 1939, the United States Government has been benefitted, according to plaintiff's calculations, to the extent of more than $12,000,000 arising out of contributions, concessions and price reductions on the part of plaintiff.

13. Plaintiff has willingly cooperated with the United States and its agencies with respect to making technical and manufacturing information available to the various agencies of the government. Plaintiff has also made available to the United States its research, technical, development, engineering, and manufacturing techniques, and these services have been utilized by the United States.

14. Plaintiff's operations at all times have been conducted with its own funds and personnel and without any direct or indirect financial assistance from the government. Plaintiff has at all times promptly and fully met its obligations to the Government of the United States, including the full payment of all taxes which plaintiff believes it owes to the government, which for 1941 were paid in the amount of $2,746,388.37 and for 1942 were paid in the amount of $9,115,761.98. Plaintiff avers that its estimated tax liability for 1943 is $7,250,000.

15. Plaintiff has conducted its operations efficiently with the result that its costs have been reduced and correspondingly it has conserved manpower and materials, many of the latter being highly critical in the present emergency.

16. Plaintiff's products, for the most part, are unique and require the highest technical skill in their manufacture and plaintiff has produced products at all times with the highest known standards.

17. In conducting its operations in the war effort, plaintiff has expended considerable effort and expense in assisting smaller concerns, giving them financial aid as well as making available to them plaintiff's engineering and technical staffs, supervisory forces, tools, and fixtures.

[fol. 8] 18. Since 1940, plaintiff has not materially increased its total compensation for its officers and executive employees even though the operations of plaintiff have greatly increased and the resulting responsibility and burden on those officers and employees has been correspondingly increased.

19. Plaintiff is informed and believes and, therefore avers that its costs and selling prices are the lowest in the industry for the quality of its products. Plaintiff's costs have been reduced over a long period of years and as these reductions have occurred, its selling prices have been correspondingly reduced to the great benefit of the United States both before and during the present war. Prior to any renegotiations with the Price Adjustment Board, plaintiff voluntarily reduced its prices to the United States in an amount of at least $8,700,000. Said reductions began as early as 1939.

20. Plaintiff avers that many of the contracts for the products manufactured by it for the United States are designated "secret," "confidential" or "restricted" and are within the provisions of the statutes and executive orders governing such contracts.

21. Defendant Forrestal, as disclosed by said final order and unilateral determination set forth in full in Paragraph 8 above, reached his conclusion through a consideration of financial, operating, and other data obtained from governmental or other sources believed by defendant Forrestal to be reliable. Defendant Forrestal has wholly failed and

neglected to inform plaintiff as to what financial, operating, and other data he took into consideration or how he used it or what weight he gave to it. At the conference on January 4, 1944, with the Navy Price Adjustment Board, New York Division, plaintiff requested but was refused a written statement disclosing the facts used by the Board in arriving at its conclusion. The only explanation given plaintiff was that the individual members of the above Board indicated by written ballot the percentage of the plaintiff's profit be-
[fol. 9] fore taxes the individual members believed should be retained by plaintiff, and an average of said ballot was taken. Plaintiff was also informed that the profits on its commercial business had been taken into consideration by the Board in arriving at its conclusion. Plaintiff avers that the defendant Forrestal and the above Board reached their conclusions arbitrarily, capriciously, unreasonably, and in violation of the plaintiff's legal rights.

22. Plaintiff is informed, believes and expects to be able to prove that contracts which have been considered by defendant Forrestal and the Price Adjustment Board (New York Division) in making his unilateral determination for the years 1941 and 1942 were partially or totally performed by plaintiff prior to April 28, 1942. Defendant Forrestal and the Board undertook for the years 1941 and 1942, unilaterally to refix the prices, or to redetermine the overall profits arising therefrom, of contracts and supplements thereto between plaintiff and the United States Government and its agencies which had been entered into as early as 1940 and totally and partially performed by plaintiff prior to April 28, 1942, October 21, 1942 and July 1, 1943. Plaintiff avers that delivery of a substantial part of the material called for by said contracts had been made by plaintiff during 1941 and prior to April 28, 1942, October 21, 1942 and July 1, 1943. Plaintiff avers, upon information and belief, that a substantial part of the dollar value of the contracts which must have been considered by defendant Forrestal and the Board were totally or partially performed by plaintiff prior to April 28, 1942, October 21, 1942 and July 1, 1943. Plaintiff is informed, believes and expects to be able to prove that the Navy Price Adjustment Board (New York Division) took into consideration the foregoing facts in arriving at its conclusion and imposed the same retroactive construction of the Renegotiation Act on plaintiff's business for

the years 1941 and 1942 in order to recapture alleged excessive profits for those years.

23. Plaintiff is informed, believes and expects to be able to prove that the personnel of the Price Adjustment Board, New York Division, consisted of four (4) members, three of whom were accountants, the fourth having been a broker [fol. 10] and is presently engaged in farming, and none of whom had had any experience in a business similar to that of plaintiff. Plaintiff avers that the said Board acknowledged that it knew of no business which was comparable to plaintiff's. Although plaintiff urged that it do so, no member of the Board had visited plaintiff's plant to familiarize himself with plaintiff's operations. Plaintiff avers that the said Board was not in a position to do so and could not have taken into consideration the "General Principles and Factors" which had been promulgated by the various Departments under date of March 31, 1943 and which are incorporated herein by reference thereto.

24. Plaintiff has contracts entered into prior to April 28, 1942, as aforesaid, and totally performed by plaintiff and the United States including final payment thereunder prior to April 28, 1942, but the total amount of business represented by such contracts has been considered by defendant Forrestal and the Board in making his unilateral determination for the years 1941 and 1942 by reason of supplementary orders having been placed (both prior to April 28, 1942 as well as subsequent to April 28, 1942) calling for plaintiff furnishing items on the same basis as furnished under the original contracts, some of which supplementary orders were not paid for prior to April 28, 1942. Included in the total amount claimed by the Navy Price Adjustment Board, as plaintiff is informed, believes and expects to be able to prove, to be renegotiable for the years 1941 and 1942 were shipments made by plaintiff on which total payments (in a substantial amount) were not made by the government during the years of such shipments, 1941 and 1942 respectively, but payments were made during the years 1943 or 1944 or payments were still not made as of February 29, 1944. The books of plaintiff do not include reserves for uncollectible accounts or adjustments or reductions in the amount claimed for shipments and even if such items were so included, they would not have been allowed by the defendant Forrestal or the Navy Price Adjustment Board (New York Division)

in considering the deductions to which plaintiff would be entitled in arriving at plaintiff's profits. Plaintiff is in-
[fol. 11] formed, believes and expects to be able to prove that a material part of the business of the plaintiff which has been considered by defendant Forrestal and the Board in making the unilateral determination is covered by billings made by plaintiff prior to April 28, 1942 for contracts totally performed by plaintiff prior thereto but not paid for by the United States Government as a result of its own delays, until after April 28, 1942.

25. Plaintiff has reinvested and risked in the war effort a sum in excess of $6,264,184.14, representing 109% of the surplus account of the plaintiff as of December 31, 1942 as shown on the books of the Company. On December 30, 1942 and December 14, 1943, plaintiff received cancellations of some of its confidential contracts which have resulted in the plaintiff incurring severe financial losses. These losses include a liability estimated at $300,000 to subcontractors and impairment of plaintiff's working capital because of plaintiff having on hand an inventory of products to fill these cancelled contracts. Plaintiff avers it estimates that the inventory of products represents a cost of $650,000 which plaintiff may never fully realize or in any event, will probably only realize over a long period of years and then probably only partially. Defendants refused to consider such items.

26. Since the inception of renegotiation proceeding, plaintiff has insisted that neither factually nor legally is there a basis for a determination by defendants or their subordinates of excessive profits for 1941 or 1942 on its business, and that the Renegotiation Act is unconstitutional.

27. Plaintiff avers that said Renegotiation Act is in violation of its rights as guaranteed to it by the Constitution of the United States and is void and without legal effect because among other things,

[fol. 12] (a) It is repugnant to Article I, Section 1; Article I, Section 8, Clause 18, and Article III, Section 1 of the Constitution of the United States in that it delegates legislative and judicial power and unlimited discretion in the application and enforcement of said Act to the defendants, the Secretaries of the Departments, and to their subordinates;

(b) It is repugnant to Amendment V to the Constitution of the United States in that it deprives plaintiff of its property without due process of law;

(c) It is repugnant to Amendment V to the Constitution of the United States in that it takes plaintiff's property for public use without just compensation;

(d) The Act permits and it has been applied by the executive agencies as to plaintiff, arbitrarily, capriciously and unreasonably and in violation of plaintiff's constitutional rights;

(e) It is repugnant to Amendment X to the Constitution of the United States in that it exercises a power not delegated to the United States;

(f) The Act is in violation of plaintiff's constitutional rights in that it is impossible for plaintiff to obtain a fair hearing inasmuch as the executive agencies designated to determine the question of refixing of the contract prices are the agencies who directly or indirectly made the contracts with the plaintiff and hence are not unprejudiced and impartial.

(g) Insofar as the statute provides that the executive officers named therein shall have the right to determine the excessiveness of profits of plaintiff on its total business for the years involved, it is in legal effect a delegation by Congress to the respective executive officers of the right to impose taxes and is, therefore, in violation of Article I, Section 1; Article I, Section 8, Clause 1, and Article I, Section 8, Clause 18 of the Constitution of the United States.

[fol. 13] 28. The Renegotiation Act (which includes the amendments to July 14, 1943) under which plaintiff's renegotiations were carried on does not provide among other things for:

(a) Any standards, policies, or rules to guide the executive officials or such of the personnel to whom they may delegate or who may re-delegate the discretion and power conferred by the Act in refixing contract prices or in determining whether excessive profits have been earned;

(b) Any legal protection against the uncontrolled legislative or judicial powers delegated to defendants and their

executive subordinates and the alteration, amendment or repeal of such powers or the rules prescribed thereunder by defendants or their executive subordinates;

(c) Any legal protection against arbitrary or capricious conclusions or determinations;

(d) Any limitation upon, or description of, the character of the material, data, and factors which may be considered by the executive officials or the personnel to whom they may delegate or may re-delegate the discretion and power conferred by the Act;

(e) A legal hearing, public or otherwise after due notice;

(f) The reception of evidence, or the right to cross-examine with respect thereto;

(g) Disclosure to the plaintiff of material data and the factors considered;

(h) Disclosure to plaintiff of the manner in which any material, data and factors was applied or used;

(i) Any record of the proceedings, findings of fact, statement of grounds or other disclosure of, the basis of the decision;

(j) Any judicial review;

(k) And furthermore, there are no regulations promulgated which provide for adequate protection against and recovery of losses, costs, and other contingencies;

and in these respects and in each thereof, is repugnant to Article I, Section 1 and Article I, Section 8, Clause 18, of the Constitution of the United States and to the Fifth and Tenth Amendments thereto.

[fol. 14] 29. As of February 29, 1944, there was due to plaintiff from the United States and its agencies or instrumentalities for shipments made and billed approximately the sum of $2,700,000. Said sum and other sums which may become due in the future, defendant Forrestal will direct, as appears in said order, to be withheld from plaintiff unless restrained and enjoined by this Honorable Court. As will appear from the averments in this complaint, such action by defendant Forrestal will tie up funds of the plaintiff far in excess of the amount actually needed to protect the United States.

30. The amount due the plaintiff from the United States Government is payable through numerous disbursing offices located throughout the United States, and the effect of the threatened withholding order, unless restrained and enjoined by this Honorable Court, will thus be to prevent the plaintiff from receiving payment on any of the accounts upon which money is due and payable to plaintiff from the government which will result in irreparable damage and injury to the plaintiff while giving the government an unjustifiable amount even if defendant Forrestal's unilateral determination is valid, constitutional, and enforceable.

31. In addition, plaintiff now has inventories of raw and finished materials and work in process or unfilled purchase orders for materials contracted for by the United States and its agencies or instrumentalities but not yet due in the sum of approximately $12,000,000. Plaintiff also has orders on its books from commercial customers in the amount of approximately $1,000,000.00.

32. As of February 29, 1944, plaintiff had on its books contracts to furnish products to the government totalling approximately $19,000,000.00. In order that plaintiff may carry on its operations to fulfill its contracts with the government and the needs of our fighting forces, it is necessary for plaintiff to purchase with its own funds and [fol. 15] furnish to its subcontractors materials for the performance of said contracts and as well to make payments out of plaintiff's funds to its subcontractors both prior to the receipt of payment from the United States. The withholding of the plaintiff's funds will seriously interfere with the plaintiff in carrying on its operations and will seriously interfere with the production of the critical materials required by the United States Government.

33. Plaintiff also avers that the greater portion of plaintiff's contracts involved herein are confidential, secret or restricted and are within the provisions of the various statutes and executive orders forbidding disclosure of their contents and it will, therefore, be impossible for plaintiff to carry on proceedings for the enforcement of its contract rights until said statutory and executive restrictions are lifted. Plaintiff is likewise restricted as to its patents and patent applications.

34. With respect to the unconstitutional statute and the unconstitutional exercise of power by the defendants herein,

plaintiff is without a plain, adequate and complete remedy at law.

(a) Plaintiff avers the legal effect of defendants' withholding order amounts to the imposition of an illegal penalty upon plaintiff.

(b) If plaintiff be regarded as having a legal remedy (which plaintiff denies it has) in the nature of a right to sue the United States for sums of money to be withheld under order of defendants and to sue each prime contractor where he may be found to recover such sums of money as the defendants may direct such contractor not to pay to plaintiff, plaintiff will be compelled to bring numerous suits at law. The number of plaintiff's customers whom the defendants threaten to instruct to not pay plaintiff monies due it are numerous and they are located throughout the United States.

[fol. 16] Thus—

(a) The large number of suits at law, which plaintiff would be required to bring, would in many instances be in localities far removed from plaintiff's offices and plant;

(b) Such multiplicity of actions would be costly and vexatious;

(c) Suits at law of the character above described, would cast upon contractors, many of whom owe plaintiff small sums of money, the duty of litigating with plaintiff grave questions of constitutional and great public import in which those contractors may not have a direct interest;

(d) If plaintiff should be forced to such a course of litigation for the protection of its rights, an irreparable disruption of its relations with its customers would ensue. Ill feeling likely would be engendered and plaintiff's property rights in the good-will now existing between plaintiff and its customers may be irreparably injured, and the normal flow of business with those customers may be impeded;

(e) If plaintiff's customers are instructed not to pay plaintiff for materials already delivered to them by plaintiff, plaintiff will be forced to select one of two courses of conduct with respect to continuing shipments to those customers, either of which is irreparably disadvantageous. If plaintiff under such circumstances shall continue to supply

products to such customers, it may jeopardize the interests of the holders of its capital stock in substantial degree, and if it shall refuse to make such shipments there will be an unnecessary deleterious effect upon the war effort.

Wherefore plaintiff prays:

(a) That this Honorable Court issue forthwith its temporary restraining order against defendants and each of them, their agents, assistants, deputies and employees, and all persons acting or assuming to act under their direction, enjoining and restraining them until the further order of the Court, from

[fol. 17] (1) Withholding or instructing or requesting the United States, or any instrumentality, agency, officer, or agent of the United States to withhold any monies due, or to become due to plaintiff from the United States or any agency or instrumentality thereof;

(2) Instructing or requesting any prime contractor or subcontractor or officer, employee or agent thereof, to withhold any monies due or to become due to plaintiff from such prime contractor or subcontractor;

(3) From further proceeding in any manner to renegotiate or refix contract prices with respect to materials and supplies furnished or to be furnished by plaintiff;

(4) From proceeding in any manner directly or indirectly, to enforce or attempt to enforce the determination and order of March 4, 1944, whether by the methods of enforcement sought to be provided by said Renegotiation Act, or by any other method,

(b) That a special court of three judges be constituted to hear and determine this cause pursuant to statute;

(c) That such restraining order be continued in force as an interlocutory injunction until final hearing and determination of this cause;

(d) That upon final hearing of this cause the interlocutory injunction herein prayed for be made permanent;

(e) That upon final hearing, the Court order, adjudge and decree that the Renegotiation Act is unconstitutional, null and void, unenforceable against plaintiff;

(f) That upon final hearing the Court, pursuant to the provisions of the Federal Declaratory Judgment Act de-

clare and decree that the Renegotiation Act is unconstitutional, null and void, and unenforceable against plaintiff;

[fol. 18] (g) That plaintiff have such other and further relief as the nature of the case may require and to the Court may seem just and proper in the premises.

Stewart and Lewis, by W. Denning Stewart, 1017 Park Building, Pittsburgh, Pennsylvania; Howard Zacharias, 1103 Law and Finance Building, Pittsburgh, Pennsylvania; Mills and Kilpatrick, by Charles Effinger Smoot, 912 American Security Building, Washington 5, D. C., Attorneys for Plaintiff.

Duly sworn to by J. F. Beggy. Jurat omitted in printing.

[fol. 19] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION SUSPENDING PAYMENT AND INTERMEDIATE ACTION—Filed March 11, 1944

It is hereby stipulated by and between plaintiff above-named and defendants above-named by their counsel duly authorized thereto as follows:

1. Defendants will cause the Navy Department to suspend payment, pending the final determination of this action by the Court of last resort, of vouchers otherwise payable by the Navy Department to plaintiff through the office of:

Certification and Disbursing Division, Bureau of Supplies and Accounts, Navy Department, Washington, D. C.

up to the sum of $1,050,000 (subject to adjustment upon further calculation by the Navy Department), for the purpose of securing payment to the United States of the amount as determined by the Under Secretary of the Navy to be excessive profits as appears from his written determination of March 4, 1944, as set forth in paragraph 8 of the com-

plaint herein. Plaintiff consents to such suspension until final determination of this action by the Court of last resort.

[fols. 20-24] 2. In all other respects defendants will cause to be stayed action to eliminate said amount of excessive profits pending the final determination of this action by the Court of last resort, and in particular will take no action to enforce the terms of said determination of March 4, 1944 referred to in paragraph 1.

3. Plaintiff will not apply to the Court for any interlocutory injunction, restraining order, or other temporary or intermediate injunctive relief pending the final determination of this action by the Court of last resort, either as prayed for in paragraphs (a) or (c) of the prayer of its complaint herein, or otherwise.

4. By entering into this stipulation neither of the parties hereto make or shall be deemed to make any admissions with respect to their rights or claims, it being understood by the parties hereto that this agreement shall be without prejudice to their substantive rights.

Mills and Kilpatrick, by Charles Effinger Smoot, W. Denning Stewart, Counsel for Plaintiff. Francis M. Shea, Asst. Atty. Gen., Counsel for Defendants. 3/9/44.

[fol. 25] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER—Filed June 12, 1944

Defendant James V. Forrestal answers the complaint herein as follows:

First Defense

1. The complaint fails to state a claim against defendant upon which relief can be granted.

Second Defense

2. The court lacks jurisdiction in that the suit is in reality against the United States, which has not consented to be sued.

Third Defense

3. The court lacks jurisdiction in that the plaintiff has a plain, adequate, and complete remedy at law.

Fourth Defense

4. Plaintiff has failed to exhaust his administrative remedies.

Fifth Defense

5. The plaintiff is not entitled to the relief sought in that, [fol. 26] so far as it is pertinent here, Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, as amended, is constitutional, and in any event is valid as against plaintiff by reason of plaintiff's assent thereto; the procedure followed in this case was correct, proper and reasonable, and in any event was assented to by plaintiff; and the determination made by defendant was correct, proper, and reasonable.

Sixth Defense

6. In April, 1942, the Congress of the United States was faced with the problems of a nation at war. It was already apparent that huge profits were being made out of war conditions and, unless appropriate measures were taken immediately, there would be war profiteering on an unprecedented scale, to the detriment of the public purse, the public morale, and the public interest. It was also apparent that many normal peacetime safeguards in the field of procurement had to be discarded. In the urgency of prosecuting the war effort, speed in arranging for production had to be a prime consideration in the execution of contracts. It was necessary that contracts be entered into before a fair and reasonable basis for such contracts could be correctly determined. To what extent the tremendous expansion of production and the means of production would affect costs was not known, nor could government or management have ascertained in advance to what extent methods of mass production could be applied in fields in which the quantities of production had theretofore not required the extensive application of such technique. Contracts had to be let for materials of war as to which no previous or adequate cost experience was available. The war situation did not permit detailed study and analysis of such considerations by Government and industry, and bargaining on the basis thereof.

7. Shortly before April, 1942, the Supreme Court of the United States had spoken with respect to the problems of war and of war profits. The Court noted the various measures which the Congress had taken at times to meet the "recurrent evil of war profiteering" and recognized the possible need "that still other measures must be devised." But if the executive is in need of additional laws by which [fol. 27] to protect the nation against war profiteering," the Court stated, "the Constitution has given to Congress, not to this Court, the power to make them." *U. S.* v. *Bethlehem Steel Corp.*, 315 U. S. 289, 309 (1941).

8. To meet the responsibility of protecting the nation against inordinate war profits and of providing effectively for the gigantic task of wartime procurement, and after carefully considering various other measures which were upon such consideration found to be inadequate, the Congress incorporated Section 403 in the Sixth National Defense Appropriation Act, 1942, approved April 28, 1942, which, as amended, is known as the Renegotiation Act. All action of defendant and of his subordinates and subordinate bodies pertinent to the issues here was taken pursuant to the Renegotiation Act, and authority duly delegated thereunder.

9. During June, 1942, an auditor was authorized by the Navy Department to advise and assist plaintiff in the preparation of a report relating primarily to plaintiff's costs, expenses, profits and other pertinent data concerning contracts between plaintiff and the Navy Department. The report submitted by plaintiff through such auditor was dated July 1, 1942, and submitted to the Navy Price Adjustment Board on or about July 7, 1942.

10. On August 17, 1942, the first meeting between the Navy Price Adjustment Board and plaintiff's representatives was held in Washington, D. C. After mutual discussion of pertinent factors, the Board proposed that plaintiff's profits on Navy business for 1941 and 1942 should be reduced. Plaintiff's representatives were furnished with a copy of the company's past earnings statement, an estimate of its earnings for 1942, and a list of items of cost which had been disallowed. The meeting was then adjourned in order to give plaintiff's representatives an opportunity to review such statements and estimate, and

[fol. 28] it was agreed to hold another meeting on August 31, 1942.

11. At a second meeting in Washington, D. C., on August 31, 1942, the company's representative gave the Board a balance sheet and a profit and loss statement as of June 30, 1942, and a written memorandum containing details of the company's past performance. After fully considering all the facts concerning the company and the facts and arguments presented by its representatives, during an adjournment taken for the purpose, the Board made a proposal to the company's representatives for the elimination of excessive profits realized and likely to be realized for the fiscal year 1942. The Chairman of the Board also stated that it was the Board's opinion that plaintiff's profits on war business during 1941 were abnormally high. Plaintiff's representatives stated that they would answer the Board's proposal in about a week, after the company's directors had considered the proposal.

12. The third meeting between the Board and plaintiff's representatives was held September 30, 1942. The plaintiff's president made a counter-proposal. No agreement to eliminate excessive profits resulted from this meeting.

13. The fourth in the series of meetings between the Navy Price Adjustment Board and plaintiff's representatives was held December 30, 1942. The company's representatives submitted certain data, but said that the statement showing its financial operations during 1942 would not be ready until February, 1943. The meeting was then adjourned pending receipt of such information.

14. In June, 1943, a representative of the Navy Department was sent to plaintiff's office to assist plaintiff in the preparation of financial data relating to its operations for the year ended December 31, 1942, and particularly relating to the segregation of plaintiff's sales, costs and expenses, [fol. 29] and profits for such year into renegotiable and non-renegotiable business. The data prepared by such representative and plaintiff's officers and employees were typed in report form by plaintiff and submitted by plaintiff to the Navy Price Adjustment Board (New York Division) in September, 1943, as its statement of renegotiable and non-renegotiable business for the year ended December 31, 1942.

15. On December 28, 1943, a fifth meeting was held by the Board with the company's representatives. Plaintiff was represented by George H. Deike, president and treasurer; John H. Beggy, vice-president, secretary and assistant treasurer; W. Denning Stewart and Howard Zacharias, attorneys. The Navy Price Adjustment Board members present were Comdr. N. L. McLaren, chairman of the meeting; P. C. Ward, L. Montamat and W. R. Hill, Jr., who collectively represented a broad experience in connection with the financial, executive and general problems of a great variety of businesses. Representatives of the Board's Analysis Division and of the Office of Procurement and Material were also present. Facts concerning the company's operations during 1942 were discussed, and the company's representatives were given full opportunity to describe its business operation and to present any and all evidence and arguments which it deemed material with respect to the renegotiation of its contracts.

16. The Board then considered the renegotiation of plaintiff's 1941 renegotiable business. Plaintiff's attorney objected to the renegotiation of any of the company's 1941 business.

17. Plaintiff's representatives stated that they believed the Board did not have enough information regarding its business to enable the Board to conduct renegotiation proceedings at that time, and that a comprehensive memorandum regarding the company's business and legal position had just been prepared. The chairman of the meeting orally [fol. 30] reviewed point by point the information contained in a report which had been prepared for the Board by its Analysis Division. In order to give the Board members an opportunity to consider the additional information in the company's memorandum, the meeting was adjourned.

18. On January 4, 1944, meeting number six was held. The chairman of the meeting stated that all of the Board members present had read the company's memorandum dated December 28, 1943, and had considered the contents thereof. He reminded the company's representatives that at the close of the December 28, 1943 meeting he had reviewed the report prepared for the Board by its Analysis Division point by point, more fully to inform the company of the facts which the Board would consider in reaching a conclusion as

to whether or not plaintiff had realized excessive profits. He stated that this was the sixth meeting with the company and that he believed the Board had all the facts necessary to enable it to make a determination, but said nevertheless that the Board would be glad to hear and consider any additional statement or facts that the plaintiff's representatives wished to present.

19. Mr. Stewart, the company's attorney, said that the company's performance justified a finding that it had realized no excessive profits during 1941 or 1942. He said that the Board should leave well enough alone and by doing so encourage the company to continue to put forth its best efforts to serve the Government. The chairman asked whether the Board was to infer that if it made a determination of excessive profits, the company would relax its efforts to produce war materials. Mr. Stewart answered that the Board should be realistic and should realize that the company might be discouraged if it thought that any profits resulting from its efforts would be eliminated. He said that the company was working on new developments [fol. 31] of great importance to the Government and that it was more important to encourage the company to continue its developmental program than to obtain a refund.

20. After further discussion the meeting was temporarily adjourned so that the members of the Board might consider the facts and arrive at a decision. In determining whether and to what extent the plaintiff had made excessive profits in 1941 and 1942, the Board considered all the "General Principles Followed and Factors Considered in Determining the Existence of Excessive Profits," to the extent present, set forth at pages 7 and 8 of the "Joint Statement by the War, Navy and Treasury Departments and the Maritime Commission" of "Purposes, Principles, Policies and Interpretations" applicable under the Renegotiation Act, which had been promulgated under date of March 31, 1943. In particular, the Board considered the plaintiff's production record and the performance of its products; the fact that the plaintiff had not been financed or furnished facilities by the United States to increase its capacity for manufacturing war products; the company's developmental contribution with respect to certain products; and the withholding of one such product in particular from commercial distribution at the request of the Navy; the reductions in

price made by the company; the efficient and economic manner in which the company had conducted its operations; the extent of its subcontracting; and all other facts presented by the company. Upon the basis of such consideration and after a full discussion of all the facts and factors, the Board reached a conclusion as to the amount of excessive profits realized by plaintiff during the years ended December 31, 1941 and December 31, 1942, on contracts and subcontracts subject to renegotiation.

21. The meeting was thereafter resumed and the Board, through the chairman, told plaintiff's representatives that [fol. 32] the Board suggested a refund of $4,400,000 for the fiscal year ended December 31, 1942, and that it estimated that after the application of the credit for taxes previously paid, such refund would amount to about $875,000 in cash and $350,000 in reduction of post-war credit. Upon renegotiable sales for the year ended December 31, 1941, totalling $2,941,524, the Board suggested a refund of $550,000 and stated that it estimated that after application of the credit for taxes paid, such refund would amount to about $152,000 in cash. The company's representatives agreed to notify the Board within ten days whether or not the company would agree to the proposed refund.

22. Thereafter, plaintiff submitted a written statement to the Board, dated January 12, 1944, signed by J. F. Beggy, vice-president of plaintiff, and headed "Confidential," which set forth arguments and purported facts, in large part repetitive of data and contentions previously submitted, to support plaintiff's contention that it had realized no excessive profits during the years ended December 31, 1941, and December 31, 1942. The said written statement concluded with a rejection of the Board's proposal, and a request for reconsideration.

23. At a meeting held January 17, 1944, the board reconsidered and confirmed the conclusion arrived at January 4, 1944. Plaintiff was notified thereof by a letter dated January 19, 1944, which is set forth in paragraph 7 of the complaint.

24. Thereafter, the Board reported to the Secretary of the Navy its proposal to plaintiff and plaintiff's rejection of such proposal. It transmitted to the Secretary all pertinent papers, including the documents submitted by plain-

tiff and the minutes of the six meetings with plaintiff. The Board recommended issuance of a unilateral determination.

25. By letter dated January 28, 1944, Hon. Ralph A. Bard, [fol. 33] as Acting Secretary of the Navy, wrote to plaintiff as follows:

> "The Price Adjustment Board of the Navy Department (New York Division) has advised me that it has been unable to reach a voluntary agreement with you with respect to the excessive profits realized by you under Section 403 for your fiscal years ended December 31, 1941, and December 31, 1942. The Board has recommended the issuance by me of a unilateral determination with respect to the $550,000 of excessive profits for the year ended December 31, 1941, and $4,400,000 of excessive profits for the year ended December 31, 1942, found by the Board to have been earned by you for such fiscal periods.
>
> "Before doing so, however, I wish to grant you a full opportunity to submit any additional information and to present any contentions deemed material by you in determining the excessiveness of said profits and the renegotiability of the contracts and subcontracts giving rise thereto.
>
> "If you wish to be heard with respect to the determination of excessive profits for your fiscal years ended December 31, 1941, and December 31, 1942, please advise me not later than February 10, 1944. Otherwise, action will be taken to eliminate such excessive profits for your fiscal years ended December 31, 1941, and December 31, 1942, by directing the withholding of payments otherwise due to you in accordance with the provisions of the statute."

26. By letter dated February 7, 1944, and signed by J. F. Beggy, the vice-president, plaintiff wrote to Hon. Ralph A. Bard, Acting Secretary of the Navy, as follows:

> "Receipt is acknowledged of your letter of the 28th ult. with reference to the above entitled subject matter.
>
> "We note that you desire to give this company a full opportunity to submit any additional information and to present any contentions deemed material by it in

determining the excessiveness of the profits and the renegotiability of the contracts and subcontracts giving rise thereto.

"You are advised that this company desires to avail itself of the opportunity above referred to. It has been the position of this company from the inception of the renegotiation proceedings that neither factually nor legally is there a basis for a determination of excessiveness of profits for the years involved, and the company desires to present these positions at length to you.

"As you did not indicate in your letter the date of [fol. 34] any hearing which you may afford this company, we would appreciate it if you would fix the date for such hearing after February 21, as there are pressing matters which make it impossible for the representatives of this company and our counsel to be present before that date."

27. Thereafter, defendant James V. Forrestal, then Under Secretary of the Navy, became available to meet plaintiff's representatives on February 22, 1944, and did meet them on that day. He examined and considered the financial, operating and other data and arguments theretofore submitted to the Navy Price Adjustment Board by the plaintiff and some data obtained from governmental and other reliable sources. He also considered each of the facts and contentions presented by plaintiff orally and an additional statement dated February 17, 1944.

28. After such examination and consideration, and having afforded plaintiff full opportunity to submit any additional information and to present any contentions deemed material, defendant, in his then capacity of Under Secretary of the Navy, found and determined that $550,000 of the profits realized by plaintiff during the year ended December 31, 1941, and $4,400,000 of the profits realized by plaintiff during the year ended December 31, 1942, under contracts and subcontracts subject to the Renegotiation Act, were excessive.

29. The said finding and determination of defendant is set forth in his letter to plaintiff dated March 4, 1944, the text of which is quoted in paragraph 8 of the complaint.

30. On March 8, 1944, the complaint herein was filed. Thereafter counsel for the parties herein stipulated as follows:

"1. Defendants will cause the Navy Department to suspend payment, pending the final determination of this action by the Court of last resort, of vouchers otherwise payable by the Navy Department to plaintiff through the office of:

Certification and Disbursing Division, Bureau of Supplies and Accounts, Navy Department, Washington, D. C.

up to the sum of $1,050,000 (subject to adjustment [fol. 35] upon further calculation by the Navy Department), for the purpose of securing payment to the United States of the amount as determined by the Under Secretary of the Navy to be excessive profits as appears from his written determination of March 4, 1944, as set forth in paragraph 8 of the complaint herein. Plaintiff consents to such suspension until final determination of this action by the Court of last resort.

"2. In all other respects defendants will cause to be stayed action to eliminate said amount of excessive profits pending the final determination of this action by the Court of last resort, and in particular will take no action to enforce the terms of said determination of March 4, 1944, referred to in paragraph 1.

"3. Plaintiff will not apply to the Court for any interlocutory injunction, restraining order, or other temporary or intermediate injunctive relief pending the final determination of this action by the Court of last resort, either as prayed for in paragraphs (a) or (c) of the prayer of its complaint here, or otherwise.

"4. By entering into this stipulation neither of the parties hereto make or shall be deemed to make any admissions with respect to their rights or claims, it being understood by the parties hereto that this agreement shall be without prejudice to their substantive rights."

31. Pursuant to said stipulation, defendant is now holding unpaid vouchers payable to plaintiff in the amount of

$1,050,000. Said amount already withheld is sufficient fully to satisfy the obligation of the plaintiff for excessive profits determined to be due. There is, therefore, no occasion to seek any additional amounts or any other method of collection, and defendant has no reason to, and does not intend to seek any additional amounts or any other method of collection.

32. Plaintiff's renegotiable sales for the year ended December 31, 1941, amounted, on the basis of data secured from plaintiff's books, to $2,941,524.04. Plaintiff's profits on said sales amounted, on the basis of such data, to $940,299.73, or an operating profit in relation to sales of 32 per cent. Plaintiff's profits on such renegotiable sales after elimination of the $550,000 of excessive profits, amount to $390,299.73, which represents a profit of 16.3 per cent on plaintiff's adjusted renegotiable sales of $2,391,524.04 for [fol. 36] such year. Allowing for the tax credit to which plaintiff is entitled under Section 3806 of the Internal Revenue Code, elimination of the excessive profits in the amount of $550,000 results in a reduction in net profits after taxes of only $140,037.15. The Navy Price Adjustment Board and defendant, did not consider plaintiff's non-renegotiable business in arriving at their respective conclusions as to plaintiff's realization of excessive profits for the year ended December 31, 1941. Defendant has been informed and believes, and therefore avers, that plaintiff's books would show that its net profit for the year 1941, after payment of taxes and after elimination of the excessive profits determined to have been realized, amounts to $1,183,387.07, and that this amount of net profit is in excess of 23 per cent of plaintiff's net worth at the beginning of said year.

33. Plaintiff's renegotiable sales for the year ended December 31, 1942, amounted, on the basis of data furnished by plaintiff, to $23,957,238.61 and plaintiff's operating profits on said sales amounted, on the basis of such data, to $6,737,140.87, or an operating profit in relation to sales of 28.1 per cent. Plaintiff's profits on such renegotiable sales for the year ended December 31, 1942, after elimination of the $4,400,000 of excessive profits amounted to $2,337,140.87, which represents a profit of 11.95 per cent on plaintiff's adjusted renegotiable sales of $19,557,238.61. Allowing for the tax credit to which plaintiff is entitled under Section 3806 of the Internal Revenue Code, elimination of the ex-

cessive profits in the amount of $4,400,000 results in a reduction in net profits after taxes of only $874,836.63 and a reduction of post-war credit of $349,934.64. The Navy Price Adjustment Board (New York Division) and defend- [fol. 37] ant did not consider plaintiff's non-renegotiable business in arriving at their respective conclusions as to plaintiff's realization of excessive profits for the year ended December 31, 1942. Defendant has been informed and believes, and therefore avers, that plaintiff's books would show that its net profit for the year 1942, after payment of taxes, and after elimination of the excessive profits determined to have been realized, amounts to $1,948,345.90, and that this amount of net profit is in excess of 31 per cent of plaintiff's net worth at the beginning of said year.

34. Plaintiff's annual volumes of sales and its profits thereon for the base-period years of 1937 to 1940, inclusive, were as follows:

	Sales	Operating Profits Before Taxes	Percentage of operating profits to Sales	Net Profits After Taxes	Return on Net Worth	Opening Net Worth (per books)
1937	4,670,719	463,127	9.92	333,127	.....	.....
1938	4,821,983	565,664	11.73	458,664	12.05	3,806,422
1939	5,309,165	525,085	9.89	415,085	9.97	4,165,054
1940	8,327,149	1,044,713	12.55	619,713	13.71	4,518,544
Average	5,782,254	649,647	11.24	456,647	.....	.....

35. The finding and determination of the Under Secretary of the Navy, as aforesaid, are correct, reasonable, and justified both in fact and in law.

Seventh Defense

36. Defendant admits the allegations in the first sentence of paragraph 1 of the complaint. Answering the allegations in the second sentence of said paragraph, defendant admits that in 1941 and 1942 plaintiff has engaged in the business described in said allegation, but defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in said sentence.

37. Defendant denies the allegations in paragraph 2 of the complaint. Defendant admits that the net amount of the excessive profits determined to be due for the years 1941 and 1942 is approximately $1,015,000.

[fol. 38] 38. Defendant Forrestal admits the allegations in paragraph 3 of the complaint, except that defendant sug-

gests that since this action was commenced, Frank Knox has died.

39. Defendant admits the allegations in paragraph 4 of the complaint, except that defendant suggests that since this action was commenced, James V. Forrestal has been appointed Secretary of the Navy.

40. Defendant admits the allegations in paragraph 5 of the complaint.

41. Defendant admits the allegations in subparagraphs 6a and 6b of the complaint. Answering subparagraph 6c of the complaint, defendant admits that he established a Price Adjustment Board with divisions in New York, N. Y. and Washington, D. C. by a directive dated June 22, 1943 and that he delegated to said Board some, but not all of his authority under the Renegotiation Act.

42. Defendant is not required to answer the allegations in the first two sentences of paragraph 7 of the complaint. Answering the remaining allegations in said paragraph, defendant admits that the memorandum referred to in the last sentence of said paragraph contains some confidential material; defendant refers to the averments set forth in paragraph 18 to 29, inclusive of this answer, and except as admitted or then averred, denies the said allegations.

43. Defendant admits that he wrote plaintiff the letter quoted in paragraph 8 of the complaint, but refers to paragraphs 30 and 31 of this answer for a statement of the procedure which was adopted to eliminate the excessive profits found to have been realized by plaintiff.

44. Defendant admits the allegations in paragraph 9 of the complaint that he included in the plaintiff's business determined to be renegotiable, some contracts and purchase orders involving less than $100,000. The remaining allega- [fol. 39] tions in said paragraph are conclusions of law which defendant is not required to answer; defendant nevertheless denies the same.

45. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 10 of the complaint, except that defendant admits that some of plaintiff's products have been adapted to military use and that plaintiff has contracts with some agencies of the United States.

46. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 11 of the complaint, except that defendant admits that since 1935 plaintiff has produced, at the request of the United States, some products exclusively for the armed forces.

47. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 12 of the complaint, except that defendant admits that since 1935 plaintiff has made some direct and indirect concessions to the United States and has produced some products exclusively for the said United States.

48. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 13 of the complaint, except that defendant admits that plaintiff has made available to the United States some of its technical and manufacturing information and techniques and that the United States has utilized some of such information and techniques.

49. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 14 and 15 of the complaint.

50. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations in [fol. 40] paragraph 16 of the complaint, except that defendant admits that some of plaintiff's products are made by plaintiff alone and some of its products require technical skill in their manufacture.

51. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraphs 17 and 18 of the complaint.

52. Defendant is without any knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 19 of the complaint, except that from time to time some of plaintiff's costs have been reduced as have some of plaintiff's selling prices to the United States.

53. Defendant admits the allegations in paragraph 20 of the complaint.

54. Answering the first sentence in paragraph 21 of the complaint, defendant refers to the full text of his unilateral

determination set forth in paragraph 8 thereof. Answering the last five sentences of said paragraph 21, defendant refers to the averments set forth in paragraphs 9 to 35, inclusive, of this answer and, except as there averred, denies the allegations in said five sentences of paragraph 21.

55. Defendant denies the allegations in paragraph 22 of the complaint, except that defendant admits that in making the determination for the years ended December 31, 1941, and December 31, 1942, contracts or subcontracts were considered by the Navy Price Adjustment Board and by defendant, which had been made and performed to some extent prior to April 28, 1942, but with respect to which final payment had not been made prior to such date. Defendant further admits that in making the determination as to plaintiff's excessive profits for such years, he and the Navy Price Adjustment Board (New York Division) considered as renegotiable some contracts performed to [fol. 41] some extent prior to April 28, 1942, October 21, 1942 or July 1, 1943, and under which final payment had been made on or after April 28, 1942, and prior to October 21, 1942, or July 1, 1943.

56. The allegations in the first three sentences of paragraph 23 of the complaint are irrelevant to any issue in this proceeding, but are nevertheless denied, except that defendant admits that no member of the Navy Price Adjustment Board (New York Division) panel which considered plaintiff's case, has ever been an officer or employee of a company manufacturing and selling or renting safety appliances similar to those manufactured and sold or rented by plaintiff, and that no such member personally visited plaintiff's plant. Defendant denies the allegations in the last sentence of said paragraph.

57. Defendant denies the allegations in paragraph 24 of the complaint, except that defendant admits that he and the Navy Price Adjustment Board (New York Division) considered some contracts to be renegotiable for the years ended December 31, 1941, and December 31, 1942, under which some shipments were made during either or both of such years or some billings were made by plaintiff prior to April 28, 1942, but final payments thereunder were not made by the United States until times subsequent to April

28, 1942 and in some instances, until times subsequent to the year in which such shipments were made. Defendant further admits that with respect to sales made to the United States plaintiff's books include no reserves for uncollectible accounts or adjustments or reductions in the amount claimed for shipments, and avers that the remainder of the allegations in the third sentence of said paragraph 24 are speculative and irrelevant and therefore require no answer.

58. Defendant denies the allegations in paragraph 25 of the complaint, except that defendant admits that the United [fol. 42] States cancelled some of plaintiff's contracts on and after December 30, 1942.

59. Defendant admits the allegations in paragraph 26 of the complaint.

60. The allegations in paragraph 27 of the complaint are conclusions of law which defendant is not required to answer. Nevertheless, so far as these conclusions of law are pertinent to any issue here, defendant denies the same.

61. Answering paragraph 28 of the complaint, defendant refers to the text of the Renegotiation Act, as amended and as applicable to fiscal years ended prior to July 1, 1943, for a statement of the provisions thereof and denies, so far as they may be in issue here, that said provisions, or any of them, are repugnant to the Constitution of the United States or any amendment thereof. The allegations in paragraph 28(k) of the complaint are denied, so far as they may be pertinent to any issues here.

62. Answering paragraph 29 of the complaint, defendant refers to the averments set forth in paragraphs 30 and 31 of this answer and, except as there averred and except that defendant admits that as of February 29, 1944, there was due to plaintiff from the United States and its agencies or instrumentalities for shipments made and billed a sum of money in an amount not now known by defendant, denies the allegations in said paragraph 29 of the complaint.

63. Answering paragraph 30 of the complaint, defendant refers to the averments set forth in paragraphs 30 and 31 of this answer and, except as there averred, denies the allegations in said paragraph 30 of the complaint.

64. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 31 of the complaint.

[fol. 43] 65. Answering the allegations in the last sentence of paragraph 32 of the complaint, defendant denies the same and refers to the averments set forth in paragraphs 30 and 31 of this answer for a true statement as to the withholding of funds from plaintiff. Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in said paragraph 32 of the complaint.

66. Answering the allegations in paragraph 33 of the complaint, defendant, admits that some of plaintiff's contracts, patents and patent applications are confidential, secret or restricted and are within the provisions of the various statutes and executive orders forbidding disclosure of their contents. The remaining allegations of said paragraph are conclusions of law which defendants are not required to answer; defendant nevertheless denies the same.

67. The allegations in paragraph 34 of the complaint are conclusions of law which defendant is not required to answer. Nevertheless, so far as pertinent to any issue in this proceeding, defendant denies the same and refers to paragraphs 30 and 31 of this answer for a true statement as to the collection of excessive profits due from plaintiff.

68. Except as hereinabove admitted or qualified, defendant denies each and every allegation in the complaint.

Wherefore, defendant prays for judgment dismissing the complaint, with costs and disbursements, and for such other and further relief as the Court may deem just and proper.

Francis M. Shea, Assistant Attorney General; Edward M. Curran, United States Attorney, Attorneys for Defendant.

[fol. 44] [File endorsement omitted]

[Title omitted]

APPLICATION FOR DESIGNATION OF THREE-JUDGE COURT—Filed October 10, 1944

To the Chief Justice of the United States Court of Appeals for the District of Columbia:

Plaintiff having filed in this case its complaint, seeking interlocutory and permanent injunction and a declaratory judgment to suspend and restrain enforcement of Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942 (Public Law 528, 77th Congress, Second Session, 56 Stat. 226, 245, approved April 28, 1942), as amended, said Act as amended, being otherwise known as the Renegotiation Act (50 U. S. C. A., appendix 1191), on the ground that said Act is repugnant to the Constitution of the United States, application is hereby made to the Chief Justice of the United States Court of Appeals for the District of Columbia, to designate a three-judge statutory court to hear said case, as provided by the Act of August 24, 1937, c. 754, Section 3, 50 Stat. 752; 28 U. S. C. A. Section 380a.

Dated: 10/10/44.

For the Court:

Matthew F. McGuire, Justice.

Approved:

Charles Effinger Smoot, Attorney for Plaintiff.

Seen:

Francis M. Shea, Attorney for Defendants.

[fol. 45] [File endorsement omitted]

[Title omitted]

IN UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

ORDER DESIGNATING THREE-JUDGE STATUTORY COURT—Filed October 11, 1944

Upon the request of Honorable Matthew F. McGuire, Associate Justice of the District Court of the United States for the District of Columbia, before whom there is pending

in the above-entitled cause a complaint by the plaintiff seeking interlocutory and permanent injunction and a declaratory judgment to suspend and restrain the enforcement of an Act of Congress, on the ground that such Act is repugnant to the Constitution of the United States, and notice thereof having been duly given to the Attorney General of the United States, I hereby designate Honorable Justin Miller, Associate Justice of the United States Court of Appeals for the District of Columbia, and Honorable Jennings Bailey, Associate Justice of the District Court of the United States for the District of Columbia, to participate with Honorable Matthew F. McGuire, Associate Justice of the District Court, as a three-judge statutory court to hear and determine this matter.

Dated October 11, 1944.

D. Lawrence Groner, Chief Justice of the United States Court of Appeals for the District of Columbia.

[fol. 46] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION WITH RESPECT TO DEATH OF DEFENDANT KNOX—Filed October 25, 1944

It is stipulated by the parties to this case, but solely for the purpose of this stipulation, that:

1. Defendant Frank Knox, Secretary of the Navy of the United States, died April 28, 1944.

2. Defendant James V. Forrestal was, when this action was commenced, Under Secretary and Acting Secretary of the Navy, and on May 17, 1944, became and now is, Secretary of the Navy.

3. Defendant James V. Forrestal, as Secretary of the Navy, intends, pursuant to the Renegotiation Act, unless otherwise ordered by the Court, to cause the order of March 4, 1944, to be enforced.

4. This action may be continued as an action against James V. Forrestal, and an order may be entered substitut-

[fol. 47] ing as defendant James V. Forrestal in lieu of Frank Knox and James V. Forrestal, this stipulation and such order, however, to be without prejudice to the claim of defendant Forrestal that this action is in reality one against the United States which has not consented to be sued, and without prejudice to the claim of plaintiff that it is an individual action.

Stewart and Lewis, W. Denning Stewart, Howard Zacharias, Charles Effinger Smoot, by Charles Effinger Smoot, Attorneys for Plaintiff.

Francis M. Shea, Assistant Attorney General; Edward M. Curran, United States Attorney, by Francis M. Shea, Attorneys for Defendants.

[fol. 48] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER FOR SUBSTITUTION OF PARTY DEFENDANT—Filed October 26, 1944

The Court finding from the stipulation of parties that defendant Frank Knox, Secretary of the Navy of the United States, died April 28, 1944, that defendant James V. Forrestal, who was Under Secretary and Acting Secretary of the Navy when this action was commenced, became on May 17, 1944, and now is, Secretary of the Navy, that defendant Forrestal, as Secretary of the Navy, intends, unless otherwise ordered by the Court, to cause the order of March 4, 1944, to be enforced, and that there is substantial need for continuing and maintaining this action.

It is, therefore, pursuant to Rule 25(d) of the Rules of Civil Procedure, hereby ordered that James V. Forrestal be, and he hereby is, substituted as defendant herein in lieu of defendants Frank Knox and James V. Forrestal.

This court approves the agreement of the parties that this order and its entry shall be without prejudice to the claim of defendant Forrestal that this action is in reality one against the United States which has not consented to

[fol. 49] be sued and without prejudice to the claim of plaintiff that it is an individual action.

Justin Willer, Associate Justice of the United States Court of Appeals for the District of Columbia. Jennings Bailey, Associate Justice of the District Court of the United States for the District of Columbia., Matthew F. McGuire, Associate Justice of the District Court of the United States for the District of Columbia.

Approved and consented to and service of copy of order waived.

Stewart and Lewis, W. Denning Stewart, Howard Zacharias, Charles Effinger Smoot; by, Charles Effinger Smoot, Attorneys for Plaintiff.

Francis M. Shea, Assistant Attorney General, Edward M. Curran, United States Attorney; by, Francis M. Shea, Attorneys for Defendants.

[fol. 50] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION TO SET CASE FOR HEARING—Filed November 8, 1944

The plaintiff moves the court to set the above entitled case for a hearing and as grounds therefor state:

1. This is a suit attacking the constitutionality of an Act of Congress and under the applicable law the case should "be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day." (28 U. S. C. A. 380a.)

2. In addition there are factual elements in this situation warranting an early disposition of the case, the details of which are set forth in an affidavit of Charles Effinger Smoot in support of this motion, which affidavit is made a part hereof as though set forth in full herein.

(As pointed out in the said affidavit, plaintiff would like to have at least six weeks notice of the day for which the hearing is set.)

Stewart and Lewis, W. Denning Stewart, Howard Zacharias, Charles Effinger Smoot; by, Charles Effinger Smoot, Attorneys for Plaintiff.

[fol. 51] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF CHARLES EFFINGER SMOOT IN SUPPORT OF MOTION TO SET CASE FOR HEARING—Filed November 8, 1944

DISTRICT OF COLUMBIA, ss:

Charles Effinger Smoot, being first duly sworn, deposes and says:

1. The complaint herein was filed March 8, 1944 and the answer filed June 12, 1944.

2. In similar cases officers of the government enforcing the renegotiation statute, which is involved in this case, have asserted the right of the government to interest on the amount of excessive profits (after allowance is made for the tax credit) at the rate of six per cent (6%) per annum and upon information and belief have in fact collected such interest in some cases. As set forth in the stipulation suspending payment and intermediate action filed in this case March 11, 1944, the net amount involved in this case is estimated at One Million Fifty Thousand Dollars ($1,050,000) after allowing the tax credit for the Four Million Nine Hundred Ninety Thousand Dollars ($4,990,000) determined as excessive profits by the defendant's unilateral [fol. 52] order of March 4, 1944. If interest is allowed in this case on the net amount involved, One Million Fifty Thousand Dollars ($1,050,000), the continuing liability of the plaintiff would aggregate about Sixty Three Thousand Dollars ($63,000) a year or Five Thousand Two Hundred Fifty Dollars ($5,250) a month.

3. Upon information and belief, plaintiff's business involved in this case aggregates over Twenty-four Million Dollars ($24,000,000), thousands of different items and many different contracts, which contracts have been entered into at various times over the period 1939-1942. Plaintiff wishes to be able to make final preparations for presenting the detailed evidence involved in this case shortly before the trial thereof. Accordingly, plaintiff would like to have six weeks notice of the day certain on which the trial will be conducted.

4. Upon information and belief, plaintiff is now being renegotiated for 1943 and undoubtedly may be renegotiated for 1944. Many of the problems involved in 1943 and 1944 renegotiations are constitutional and legal questions awaiting determination in this suit.

5. Upon information and belief, plaintiff is a Pennsylvania corporation and as such pays taxes to the State of Pennsylvania upon its profits. There is doubt whether or not plaintiff can recover or obtain a credit for taxes paid to the State of Pennsylvania on profits which may subsequently be recaptured under the Renegotiation Act. Possibly plaintiff is without any redress for this potential loss.

Charles Effinger Smoot.

Subscribed and sworn to before me this 8th day of [fol. 53] November, 1944. Anne A. Linke, Notary Public, D. C. (Seal.)

IN UNITED STATES DISTRICT COURT

DOCKET ENTRY

1944, Nov. 20, Motion to set for hearing heard, Ruling to the effect that Govt. is to file motion to dismiss or for summary judgment by Dec. 9, 1944; Pltf. to file reply by Dec. 15, 1944; hearing on motion to dismiss or for summary judgment (if filed) set for Dec. 18, 1944, no order, Atty's. in Court (Miller J. (C. C. A.); Bailey, J.; McGuire, J.)

[fol. 54] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION TO DISMISS THE COMPLAINT AND FOR SUMMARY—Filed December 9, 1944

Now comes the defendant herein by his attorneys and moves the Court to dismiss the complaint on the grounds that:

1. The Court lacks jurisdiction over the subject matter of the action; and

2. The complaint fails to state a claim against the defendant upon which relief can be granted.

In the alternative, the defendant moves for summary judgment pursuant to Rule 56(b) of the Federal Rules of Civil Procedure on the ground that there is no genuine issue as to any material fact and defendant is entitled to a judgment as a matter of law.

In support of the said motions the defendant offers the verified answer previously filed in this action and his affidavit, attached hereto and submitted herewith.

Francis M. Shea, Assistant Attorney General. Edward M. Curran, United States Attorney.

[fol. 55] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF JAMES V. FORRESTAL—Filed December 9, 1944

James V. Forrestal, being duly sworn, deposes and says:

1. I am, and have been since May 19, 1944, the duly appointed, qualified and acting Secretary of the Navy of the United States, and as such charged with the duties of administering Section 403 of the Sixth Supplemental National Defense Appropriation Act of 1942 (Public Law 528, 77th Cong.) approved April 28, 1942, as amended from time to

time and as applicable to fiscal years ended prior to July 1, 1943. Between August 22, 1940 and May 19, 1944, I was the duly appointed, qualified and acting Under Secretary of the Navy of the United States, and as such was charged with the duties of administering the said Act, as amended, and as applicable to fiscal years ended prior to July 1, 1943, by direction of and delegation by the then duly appointed, qualified and acting Secretary of the Navy of the United States. With respect to the matters complained of herein by plaintiff, Mine Safety Appliances Company, I have also at all material times acted for and on behalf of the "Secretaries" of the other renegotiating agencies named in said Act under appropriate delegations of power.

2. Under date of March 4, 1944, acting in my said capacity of Under Secretary of the Navy and pursuant to the said delegated powers to act under the renegotiation Act, I made [fol. 56] a unilateral order requiring the Mine Safety Appliances Company to eliminate excessive profits for its fiscal years ended December 31, 1941 and December 31, 1942, which provided in part as follows:

> "• • • pursuant to authority under the provisions of Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, as amended, duly delegated to me under subsection (f) of said Section 403, I hereby find and determine that, after allowance as costs of the portion of all expenses reported by Mine Safety Appliances Company for such periods, allocable to such contracts and subcontracts, excessive profits in the amount of $550,000 for the fiscal year ended December 31, 1941, and $4,400,000 for the fiscal year ended December 31, 1942, were realized by Mine Safety Appliances Company during such fiscal years from such contracts and subcontracts, plus the amount of any refund or credit received by, or reduction in liability of, Mine Safety Appliances Company for (a) state or other taxes (exclusive of Federal taxes) measured by income, or (b) royalties, license fees, commissions or other charges or costs, reported as an expense by Mine Safety Appliances Company for such periods, to the extent that such refund, credit or reduction in liability shall result from the elimination of said amounts of excessive profits from gross sales and from income of Mine Safety Appliances Company for such periods."

3. Subsection (c), subdivisions (2) and (3), of the Renegotiation Act of 1942 provides that, upon such a determination of excessive profits, that is, upon "renegotiation" as defined in such Act, the Secretary is authorized and directed to eliminate the amount of excessive profits so determined, less the tax credit computed pursuant to Section 3806 of the Internal Revenue Code.

4. My said unilateral order dated March 4, 1944 also provided in part as follows:

> "Unless action is taken by you not later than March 8, 1944, to eliminate said excessive profits in a manner satisfactory to me, appropriate action will be taken by me, without further notice to you, to eliminate said amount of excessive profits (after allowance thereagainst of the tax credit provided by Section 3806 of the Internal Revenue Code) by directing the withholding of amounts otherwise due to you as a contractor or subcontractor by the Government and by contractors, within the meaning of said Section 403."

5. The company failed and refused unconditionally to pay the net amount of the refund due under my said unilateral determination.

[fol. 57] 6. After the complaint herein had been served on respondents on March 8, 1944, the plaintiff's attorneys, under date of March 9, 1944, agreed and stipulated with my representative, the Attorney General of the United States, that:

> "1. Defendants will cause the Navy Department to suspend payment, pending the final determination of this action by the Court of last resort, of vouchers otherwise payable by the Navy Department to plaintiff through the office of:
>
> Certification and Disbursing Division, Bureau of Supplies and Accounts, Navy Department, Washington, D. C.
>
> up to the sum of $1,050,000 (subject to adjustment upon further calculation by the Navy Department); for the purpose of securing payment to the United States of the amount as determined by the Under Secretary of the Navy to be excessive profits as appears from his

written determination of March 4, 1944, as set forth in paragraph 8 of the complaint herein. Plaintiff consents to such suspension until final determination of this action by the Court of last resort.

2. In all other respects defendants will cause to be stayed action to eliminate said amount of excessive profits pending the final determination of this action by the Court of last resort, and in particular will take no action to enforce the terms of said determination of March 4, 1944 referred to in paragraph 1.

3. Plaintiff will not apply to the Court for any interlocutory injunction, restraining order, or other temporary or intermediate injunctive relief pending the final determination of this action by the Court of last resort, either as prayed for in paragraphs (a) or (c) of the prayer of its complaint herein, or otherwise.

4. By entering into this stipulation neither of the parties hereto make or shall be deemed to make any admissions with respect to their rights or claims, it being understood by the parties hereto that this agreement shall be without prejudice to their substantive rights."

7. Thereafter, the Certification-Disbursing Division, Bureau of Supplies and Accounts, Navy Department, Washington, D. C., suspended payment to plaintiff on vouchers submitted with respect to contracts performed by the plaintiff, and which were otherwise payable, in the total face amount of $1,054,258.65.

8. Under cover of a letter dated March 23, 1944, Mr. W. P. Mays, Internal Revenue Agent in Charge at Phila- [fol. 58] delphia, Pennsylvania, computed the amounts of tax credit due to Mine Safety Appliances Company under Section 3806 of the Internal Revenue Code to be $409,962.85 for the year ended December 31, 1941 and $3,525,163.37 for the year ended December 31, 1942, assuming refunds of excessive profits in the amounts of $550,000 for 1941 and $4,400,000 for 1942.

9. Investigation, and information secured from an officer of plaintiff in November, 1944, showed that plaintiff had not realized, nor was it likely to realize, any further excessive profits for its fiscal years 1941 and 1942 under the con-

tingencies specified in my unilateral order of March 4, 1944. Upon the basis of such facts, and since it was clear that no further amount of excessive profits would in the future be realized by the company under the contingencies set forth in said unilateral order, I forwarded a check in the amount of $39,384.87 to the company under cover of a letfer dated December 6, 1944. In this letter, I stated that the remainder of the payments suspended with respect to vouchers otherwise payable, in the total face amount of $1,014.873.78, would satisfy the company's obligation under my said unilateral order and pursuant to the Renegotiation Act, in the event that its suit was unsuccessful. A copy of such covering letter is attached to this affidavit as Exhibit A.

10. Since I have suspended payment of a sufficient amount of money to cover the full amount of net refund due under the Renegotiation Act, there is no possibility that at any time in the future I will or can proceed to collect, by withholding or otherwise, any further sum from plaintiff on account of excessive profits realized during its fiscal years 1941 and 1942.

11. All money used by the Navy Department to acquire supplies and materials is either appropriated to it by Con- [fol. 59] gress for specified purposes, or is appropriated to another Department or agency for certain purposes and thereafter pursuant to law, allocated to the Navy Department for expenditure for such purposes. Upon such appropriation or allocation the Treasury Department establishes upon its books a credit in favor of the Navy Department in the specified amounts which are thereafter available for the purposes stated by the Congress. The Navy Department makes further administrative allotments of such amounts for more particularized purposes and enters into contracts of purchase with vendors, thereby establishing obligations to pay out, upon proper performance, the amounts so appropriated. All such contracts with vendors are made by officers or employees of the Navy Department, as representatives of the United States.

12. In the absence of set-offs or counter-claims, and provided the contractor has validly performed the contract, payments of the invoices submitted by the vendor are approved in due course, and a disbursing officer of the Navy Department draws a check upon the Treasury of the United States to the order of the vendor. Checks issued

by the disbursing officer in payment of approved vouchers are paid by the Treasury Department out of funds advanced to the disbursing officer. After the disbursing officer's accounts have been reviewed and a transfer and counter warrant approved by the Comptroller General, the Treasury Department, on the basis of such transfer and counter warrant, debits the applicable appropriation account on the books of the Treasury and credits the account of the disbursing officer to whom the funds had previously been advanced.

13. The sum of $1,014,873.78, as to which payment has been suspended, is being held as an obligated but unexpended balance in the particular appropriation accounts [fol. 60] of the Navy Department applicable to the various contracts with the plaintiff. The result is that such total of suspended payments is being held by the Treasury of the United States as an unexpended portion of money appropriated by the Congress to the Navy Department or allocated to it by another Department or agency, as explained in paragraph 11 above.

14. Pursuant to the aforesaid stipulation, such money is being so held, pending the outcome of the suit, and will continue to be carried in the proper appropriation accounts on the books of the Treasury subject to applicable statutory limitations. If the plaintiff is unsuccessful in this suit, such money will immediately be transferred, on the books of the Treasury, from the appropriations available to the Navy Department to miscellaneous receipts of the Treasury. The amount of payments suspended will satisfy the company's liability for excessive profits under the Renegotiation Act for its fiscal years 1941 and 1942.

James V. Forrestal, Secretary of the Navy.

WASHINGTON, DISTRICT OF COLUMBIA:

Subscribed and sworn to before me this 8th day of December, 1944.

J. S. Davitt, Notary Public.

My commission expires March 14, 1949.

[fol. 61] EXHIBIT "A" TO AFFIDAVIT

The Secretary of the Navy
Washington

6 December 1944.

Mine Safety Appliances Company, Pittsburgh, Pa.

Subject: Renegotiation Pursuant to Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, as amended, for the fiscal years ended December 31, 1941 and December 31, 1942.

DEAR SIRS:

Under date of March 4, 1944 I issued a unilateral order under the above Act, finding and determining that your company realized excessive profits in the amounts of $550,000 for the fiscal year ended December 31, 1941 and $4,400,000 for the fiscal year ended December 31, 1942. In addition to such specified amounts, I also found and determined that your company realized as excessive profits

"• • • the amount of any refund or credit received by, or reduction in liability of, Mine Safety Appliances Company for (a) state or other taxes (exclusive of Federal taxes) measured by income, or (b) royalties, license fees, commissions or other charges or costs, reported as an expense by Mine Safety Appliances Company for such periods, to the extent that such refund, credit or reduction in liability shall result from the elimination of said amounts of excessive profits from gross sales and from income of Mine Safety Appliances Company for such periods."

My said unilateral order also provided in part that:

"Unless action is taken by you not later than March 8, 1944, to eliminate said excessive profits in a manner satisfactory to me, appropriate action will be taken by me, without further notice to you, to eliminate said amount of excessive profits (after allowance thereagainst of the tax credit provided by Section 3806 of the Internal Revenue Code) by directing the withholding of amounts otherwise due to you as a contractor or sub-

contractor by the Government and by contractors, within the meaning of said Section 403."

On March 8, 1944, a complaint was served in the case entitled *Mine Safety Appliances Company* v. *Frank Knox*, [fol. 62] *James V. Forrestal*, Civil Action No. 23387 (U. S. Dist. Ct., D. C.). On the following day, your counsel and Assistant Attorney General Francis M. Shea, representing me, stipulated in part as follows:

"1. Defendants will cause the Navy Department to suspend payment, pending the final determination of this action by the Court of last resort, of vouchers otherwise payable by the Navy Department to plaintiff through the office of:

Certification and Disbursing Division, Bureau of Supplies and Accounts, Navy Department, Washington, D. C.

up to the sum of $1,050,000 (subject to adjustment upon further calculation by the Navy Department), for the purpose of securing payment to the United States of the amount as determined by the Under Secretary of the Navy to be excessive profits as appears from his written determination of March 4, 1944, as set forth in paragraph 8 of the complaint herein. Plaintiff consents to such suspension until final determination of this action by the Court of last resort.

"2. In all other respects defendants will cause to be stayed action to eliminate said amount of excessive profits pending the final determination of this action by the Court of last resort, and in particular will take no action to enforce the terms of said determination of March 4, 1944 referred to in paragraph 1."

Thereafter, pursuant to my direction, the Certification-Disbursing Division, Bureau of Supplies and Accounts, Navy Department, Washington, D. C., suspended payment of vouchers otherwise payable to your company by the Navy Department, on behalf of the United States of America, in the total amount of $1,054,258.65. Under cover of a letter dated March 23, 1944, Mr. W. P. Mays, Internal Revenue Agent in Charge at Philadelphia, Pennsylvania, computed the amounts of tax credit due to your company

under Section 3806 of the Internal Revenue Code to be $409,962.85 for the year ended December 31, 1941 and $3,525,163.37 for the year ended December 31, 1942, upon the basis of refunds of excessive profits in the amounts of $550,000 for 1941 and $4,400,000 for 1942. This would leave, upon the basis of a total refund of $4,950,000, a net cash refund payable by your company amounting to $1,014,873.78.

Investigation shows that your company has not realized, nor is it likely to realize, any further excessive profits for its fiscal years 1941 and 1942 under the contingencies specified in my unilateral determination dated March 4, 1944. Since the final net amount of refund due under such determination is $1,014,873.78, I am enclosing a check in the amount of $39,384.87, which represents payment of certain vouchers with respect to which payment has heretofore been suspended.

Application of the remaining suspended vouchers in the net amount of $1,014,873.78 to your indebtedness under my [fol. 63] order will satisfy in full your company's obligation under the Renegotiation Act for your fiscal years 1941 and 1942, in the event that your company is unsuccessful in the pending suit.

Yours very truly, (S.) James Forrestal.

[fol. 64] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF J. F. BEGGY—Filed December 15, 1944

J. F. BEGGY, being duly sworn, deposes and says:

I am, and have been since January 18, 1939 the Vice President of Mine Safety Appliances Company, plaintiff above named, and make this affidavit in its behalf and by way of answer to affidavit of Hon. James V. Forrestal.

1. I admit the averments of paragraph 1. of the affidavit of said Hon. James V. Forrestal except that I am not sufficiently informed to answer as to whether said Hon. James V. Forrestal has "at all material times acted for

and on behalf of the "Secretaries" of the other renegotiating agencies named in said Act under appropriate delegations of power".

2. I admit the allegations of paragraph 2. of said affidavit.

3. For answer to paragraph 3. of said affidavit, I refer to the provisions of the Renegotiation Act of 1942, as amended.

4. I admit the averments of paragraph 4. of said affidavit except that I deny that plaintiff was notified, "Unless action is taken by you (plaintiff) not later than March 6, 1944 * * * ", and aver that the correct date is March 8, 1944. I aver that on March 8, 1944, as will appear by reference to the records in this Court, the Complaint herein was filed to stay the effective date of defendant's threatened action.

5. I admit the averment of paragraph 5.

[fol. 65] 6. I admit the averments of paragraph 6.

7. I admit the averments of paragraph 7, except that I do not have sufficient information to enable me to answer as to whether the suspension of payments and vouchers totaling $1,054,258.65 is correct. As will appear by reference to registered letter which I addressed to Hon. James V. Forrestal on December 13, 1944, I have requested information with reference to this matter, and until I am furnished with said information, I neither admit nor deny the correctness of the action of the Certification-Disbursing Division, Bureau of Supplies and Accounts, Navy Department, Washington, D. C. A true and correct copy of said letter is attached hereto and made a part hereof.

8. I have no knowledge of the letter of March 23, 1944 referred to in paragraph 8 of said affidavit, nor sufficient information as to the calculation made by the said Mr. W. P. Mays to determine whether his calculation is correct. My information is such that I believe, and therefore aver that the calculation of Mr. Mays as of March 23, 1944 could not have been other than a tentative calculation and hence could not be a final determination of the amounts of tax credit under Section 3806 of the Internal Revenue Code.

9. Inasmuch as said Hon. James V. Forrestal does not identify the person who made the investigation nor specify

the information secured from an officer of the plaintiff in November, 1944, I am unable to answer as to this portion of said affidavit. I talked with an officer of the Navy during November, 1944 and gave him certain information, but said information did not enable said Hon. James V. Forrestal to determine that plaintiff had not realized nor was likely to realize any further excessive profits for its fiscal years 1941 and 1942 as there was no discussion between me and said officer with respect to this matter. I am not sufficiently informed to answer as to whether the statement, "Upon the basis of such facts, and since it was clear that no further amount of excessive profits would in the future be realized by the company * * *" is correct. I am advised by counsel, believe and therefore aver that no answer is required of me as to the reasoning of said Hon. James V. Forrestal in arriving at the amount of the check for $39,384.67, referred to in said paragraph 9. I have returned [fol. 66] said check by letter dated December 13, 1944 and refer to said letter, which is annexed hereto, for an explanation as to my reason for believing the aforesaid amount is erroneous. As heretofore stated, I am not able to determine whether the suspended payments are correct or incorrect until I am furnished with the information referred to in my said letter of December 13, 1944.

10. I deny the averments of paragraph 10 as stated. I aver that, as will appear by reference to the stipulation of the parties referred to in paragraph 6 of the affidavit of Hon. James V. Forrestal, the suspension of payments was by agreement of the parties and not the result of sole action by the said Hon. James V. Forrestal. I am advised by counsel that as to whether there is any possibility at any time in the future said Hon. James V. Forrestal "will or can proceed to collect * * *", is purely a matter of conjecture and depends entirely upon what action the said Hon. James V. Forrestal or his successor in office may be required to take in the future pursuant to the applicable provisions of the laws of the United States.

11. I am advised by counsel, believe and therefore aver that the manner in which funds are furnished to the Navy Department to acquire supplies and materials and the manner in which said sums are expended by said Navy Department are governed by the applicable provisions of the laws of the United States and I am not required to answer as to these matters.

12. I am not sufficiently informed as to the manner in which the matters averred in paragraph 12 of the Hon. James V. Forrestal's affidavit are handled within the Navy Department or the other departments which are involved in this proceeding and hence I make no admission or denial of the averments of said paragraph.

13. I am informed that the only manner in which the sum of $1,014,873.78 referred to in paragraph 13 of the affidavit of the Hon. James V. Forrestal, or any other sum, may be withheld, is in accordance with the provisions of the stipulation between the parties hereto of March 9, 1944. I have not sufficient information to answer as to any other manner of withholding on the part of the Navy Department, but as has been heretofore stated in my affidavit, until in-
[fol. 67] formation is furnished me as to the various contracts, I am unable to answer as to whether the withholding is proper in amount. I deny the conclusion of the said Hon. James V. Forrestal that, "The result is that such total of suspended payments is being held by the Treasury of the United States as an unexpended portion of money appropriated by the Congress to the Navy Department or allocated to it by another Department or agency, * * *" if by such conclusion, said Hon. James V. Forrestal intends to suggest, said funds are in the Treasury of the United States and are not presently payable to the plaintiff by virtue of the contract obligations between the United States and the plaintiff, and in this connection I aver that other departments of the Government, as will appear from the affidavit of said Hon. James V. Forrestal, paragraph 1, are involved in this proceeding.

14. I aver that the stipulation referred to in paragraph 14 speaks for itself and governs the obligations of the defendant with reference to the funds of the plaintiff therein referred to.

J. F. Beggy, Vice President.

City of Pittsburgh,
County of Allegheny,
State of Pennsylvania

Subscribed and sworn to before me this 14th day of Dec., 1944.

R. E. Malone, Notary Public. My commission expires April 7, 1947. (Seal.)

[fol. 68] Copy

Everything for Mine and Indusfrial Safety

Churchill
5900

Cable Address
"Minsaf" Pittsburgh

Mine Safety Applicances Co.

Braddock, Thomas and Meade Streets

Pittsburgh 8, Pa.

In Reply Please
Refer to

December 13, 1944

Registered Mail

Hon. James V. Forrestal
The Secretary of the Navy
Washington, D. C.

Dear Sir:

Receipt is acknowledged of your letter of the 6th inst. addressed to this Company enclosing Check No. 609,587 of the Treasurer of the United States in the sum of $39,384.87, dated December 2, 1944, together with vouchers numbered D. O. 1927, 1928, 1929 and 1930.

We are herewith returning the above described check and vouchers for the reason that, as we understand the situation, your calculation is in error. You did not favor us with a copy of the letter of March 23, 1944 from Mr. W. P. Mays so that we are not in a position to determine whether Mr. Mays' calculation is final or tentative. As we understand the situation, this calculation could not have been final and hence the result as stated in your letter is, in our opinion, not final.

In order to verify the total of $1,054,258.65, we feel that we should be furnished with a list of the vouchers showing the United States contract number, Mine Safety Appliances Company invoice number and date, the number of units, and the price and total of each item making up this total, as without this information we are unable to identify the

contracts and material involved in this amount of $1,054,258.65.

Very truly yours,
Mine Safety Appliances Company, J. F. Beggy, Vice President.

JFB: brm
Encs.

Exclusive World Distributors of Edison Electric Cap Lamps

[fols. 69-100] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

[File endorsement omitted]

Civil Action No. 23,387

MINE SAFETY APPLIANCES COMPANY, Plaintiff

vs.

FRANK KNOX, JAMES V. FORRESTAL, Defendants

Before Miller, Associate Justice, United States Court of Appeals, District of Columbia, and Bailey and McGuire, Associate Justices, District Court of the United States for the District of Columbia, sitting as a statutory three-judge court.

OPINION—Filed March 15, 1945

McGUIRE, J:

The plaintiff Mine Safety Appliances Company is a corporation engaged in the manufacturing, selling, exporting, and installing throughout the United States and elsewhere, mining and industrial equipment and protective apparatus for the protection of life and property.

For several years past the company, both as a prime contractor and as a sub-contractor has secured so-called war contracts, presumably subject to the provisions of the Renegotiation Act, 50 U. S. C. A. Appendix § 1191.

On March 4, 1944, the defendant Forrestal as Under Secretary of the Navy, acting under authority of the Act made

a unilateral order requiring the company to eliminate excessive profits for its fiscal years ending December 31, 1941, and December 31, 1942. The order provided in part as follows: "Unless action is taken by you not later than March 8, 1944, to eliminate said excessive profits in a manner satisfactory to me, appropriate action will be taken by me, without further notice to you, to eliminate said amount of excessive profits * * * by directing the withholding of amounts otherwise due to you as a contractor * * *. [fol. 101] The plaintiff company failed and refused to comply with the order and on March 8, 1944, filed the complaint herein which prayed for an injunction to restrain the defendant from:

"(1) Withholding or instructing or requesting the United States, or any instrumentality, agency, officer, or agent of the United States to withhold any monies due, or to become due to plaintiff from the United States or any agency or instrumentality thereof;

(2) Instructing or requesting any prime contractor or subcontractor or officer, employee or agent thereof, to withhold any monies due or to become due to plaintiff from such prime contractor;

(3) From further proceeding in any manner to renegotiate or refix contract prices with respect to materials and supplies furnished or to be furnished by plaintiff;

(4) From proceeding in any manner directly or indirectly, to enforce or attempt to enforce the determination and order of March 4, 1944, whether by methods of enforcement sought to be provided by said Renegotiation Act, or by any other method."

The complaint further prayed that a special court of three judges be constituted and that upon final hearing the court order, adjudge and decree that the Renegotiation Act is unconstitutional, null and void, and unenforceable against the plaintiff.

After the complaint had been served the parties entered into a stipulation as follows: "Defendants will cause the Navy Department to suspend payment, pending final determination of this action by the Court of last resort, of vouchers otherwise payable by the Navy Department to

the plaintiff * * * up to the sum of $1,050,000 (subject t adjustment upon further calculation by the Navy Department) for the purpose of securing payment to the United States of the amount as determined by the Under Secretary of the Navy to be excessive profits as appears [fol. 102] from his written determination of March 4, 1944 * * * Plaintiff consents to such suspension until final determination of this action by the Court of last resort.

(2) In all other respects defendants will cause to be stayed action to eliminate said amount of excessive profits pending the final determination of this action by the Court of last resort, and in particular no action to enforce the terms of said determination of March 4, 1944 * * *.

(3) Plaintiffs will not apply to the court for any interlocutory injunction, restraining order, or other temporary or intermediate injunctive relief pending the final determination of this action by the Court of last resort * * *

(4) By entering into this stipulation neither of the parties hereto make or shall be deemed to make any admissions with respect to their rights or claims, it being understood by the parties hereto that this agreement shall be without prejudice to their substantive rights."

Thereafter the Navy Department suspended payment to the plaintiff on vouchers submitted with respect to contracts performed by *the company*, and which were otherwise payable, in the amount of $1,014,873.78 which sum is being held as an obligated but unexpended balance in the particular appropriation account of the Navy Department applicable to the various accounts of the plaintiff. The practical effect of this is that the total of suspended payments is being held by the Treasury of the United States as an unexpended portion of money appropriated by the Congress to the Navy Department or allocated to it by any other department or agency.

The statutory court of three judges having been convened as prayed for the defendant moved to dismiss the complaint on jurisdictional grounds and our determination herein is upon that motion.

[fol. 103] Immediately *in limine* we are confronted with the initial and controlling inquiry as to whether this is in fact a suit against the United States.

If it is, or if their interests are substantially affected, then the suit fails for it is basic law that the sovereign cannot be sued without its consent.

U. S. ex rel. Goldberg v. Daniels, 231 U. S. 218, 34 S. Ct. 84, 58 L. Ed. 191.

This prohibition rests upon sound and cogent reasons of public policy, and is embedded deeply in the common law.

The United States cannot be subjected to legal proceedings of any character without their consent; and whoever institutes such proceedings *must* bring his case within the authority of some act of Congress.

United States v. Clarke, 8 Pet. 436, 8 L. Ed. 1001;
Lynch v. U. S., 292 U. S. 571, 78 L. Ed., 1434, 54 S. Ct. 840;
The Siren, 7 Wall. 152, 19 L. Ed. 129.

Again it has been held and now is settled definitely that if the United States is not a formal party defendant—if their interests are so *directly* involved that they are actually the real party in interest, and any relief or judgment that might be granted or entered will operate against them,—they are by nature of this fact an indispensable party and the suit as a consequence must fail, for you cannot do by indirection what you are forbidden to do directly.

Morrison v. Work, 266 U. S. 481, 45 S. Ct. 149, 69 L. Ed. 394;
Wells v. Roper, 246 U. S. 335, 38 S. Ct. 317, 62 L. Ed. 755;
International Postal Supply Co. v. Bruce, 194 U. S. 601, 24 S. Ct. 820, 48 L. Ed. 1134;
Belknap v. Schild, 161 U. S. 10, 16 S. Ct. 443, 40 L. Ed. 599;
In re Ayers, 123 U. S. 443, 502, 8 S. Ct. 164, 181, 31 L. Ed. 216.

[fol. 104] It is equally well established that if an indispensable party is not joined the suit will be dismissed.

Gnerich v. Rutter, 265 U. S. 388, 44 S. Ct. 532, 68 L. Ed. 1068;
Webster v. Fall, 266 U. S. 507, 45 S. Ct. 148, 69 L. Ed. 411.

Is this suit here, therefore, in essence one against the defendant Forrestal, or is he actually only the nominal party and the interests to be directly affected by granting of the relief prayed for, those of the United States?

If they are, then the courts have no jurisdiction, unless by the authority of Congress they have been accorded such.

The question is most certainly, not a new one, but the line of demarcation is not easily drawn, and its repeated litigation has not served the purpose of clarification any too well.

Early in our law Chief Justice Marshall laid down the doctrine that the question as to whether a suit is against the sovereign ((State)—and as a consequence within the prohibition of the Eleventh Amendment)—is to be determined by the nominal parties of record.

Osborn v. Bank of United States, 9 Wheat, 738, 857, 6 L. Ed. 204.

If that were the law today it would be determinative of the matter here. But while that case is still the law of the land in other respects, it is now finally settled the courts will look behind the designation of parties on the record and seek to determine who are the *real* parties to the litigation.

New Hampshire v. Louisiana and New York v. Louisiana, 108 U. S. 76, 2 S. Ct. 176, 27 L. Ed. 656;
Minnesota v. Hitchcock, 185 U. S. 373, 22 S. Ct. 650, 46 L. Ed. 954;
In re Ayers, *supra;*
Ford Motor Company v. Department of Treasury (Sup. Ct. of U. S. # 75 Oct. Term 1944, decided January 8, 1945), 89 L. Ed. 372, 376.

[fol. 105] And it makes no difference whether it is contended a State or the United States is or is not involved, the principle, in essence, is the same.

In litigation involving this principle two classes of cases have arisen.

Pennoyer v. McConnaughy, 140 U. S. 1, 8, 9, 10, 11 S. Ct. 699, 35 L. Ed. 363.

The *first*, in which the action is brought against the officers of the sovereign representing *its* action and *liability*, thus making *it* though not a party of record, the real party

against whom the judgment sought will function and operate so as to compel *it* to perform *its* contract, or respond to *its* other obligations.

In re Ayers, *supra*;

Hagood v. Southern, 117 U. S. 52, 6 S. Ct. 608, 29 L. Ed. 805;

Louisiana v. Jumel, 107 U. S. 711, 2 S. Ct. 128, 27 L. Ed. 448.

The *second*, in which there is an invasion of a LEGAL right, either on the part of the Government, or an officer of it, acting either under color of an unconstitutional statute, or in excess of the power validly conferred by a constitutional one.

It is to be noted however, that the right invaded must be a LEGAL one "• • • one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege • • • •"

Tennessee Power Co. v. T. V. A., 306 U. S. 118, 137, 138, 59 S. Ct. 366, 83 L. Ed. 543.

What is the right sought to be enforced here?

It certainly is not one of property; the complainant has no right to *the monies* appropriated by Congress for the Navy Department.

There most certainly is no *tortious* invasion of any *right* of the complainant by the defendant Forrestal, nor is there any right arising out of any privilege conferred by statute. [fol. 106] And if, *arguendo*, it is urged that the complainant's case is bottomed on a right arising out of contract—what is the nature of the relief sought?

Stripped of all legal verbiage, and reduced to its simplest terms, it is sought to force the United States, through Forrestal in his official capacity—as its officer—to perform *its* promise to pay.[1]

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[1] Wherefore plaintiff prays:

(a) That this Honorable Court issue forthwith its temporary restraining order against defendants and each of them, their agents, assistants, deputies and employees, and all persons acting or assuming to act un-

The defendant Forrestal has no personal interest in the matter and no official authority to grant the relief asked. We conclude therefore, that the United States is the real party in interest, for against it only would a decree be operative, and the suit thus being in substance one against the sovereign, this court has no jurisdiction.

[fol. 107] The United States and they alone are to be affected by the relief here sought. The suit therefore in substance is one against the United States;

In re Ayers, *supra.*

and can be distinguished from those cases in which a definite right of the complainant has been invaded by the act of the officer in question.

Where the action in fact is one for the recovery of money from the sovereign, the latter "• • • is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit, even though individual officials are nominal defendants."

Ford Motor Co. v. Dept. of Treasury, *supra.*

The cases cited by the complainant in support of its theory that the United States is not a necessary party, can all be distinguished, in that they either are not apposite or fall within the second category referred to above.

Tennessee Power Co. v. T. V. A., *supra.*

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der their direction, enjoining and restraining them until the further order of the Court, from

(1) Withholding or instructing or requesting the United States, or any instrumentality, agency, officer, or agent of the United States to withhold any monies due, or to become due to plaintiff from the United States or any agency or instrumentality thereof

• • • • • • •

(c) That such restraining order be continued in force as an interlocutory injunction until final hearing and determination of this cause;

(d) That upon final hearing of this cause the interlocutory injunction herein prayed for be made permanent;

• • • • • • •

Again, *a fortiori*, "* * * the right to proceed against an individual, even though an officer, to prevent a violation of the Constitution did not include the right to *disregard* (italics supplied) the Constitution by awarding relief which could not rightfully be granted without *impleading* (italics supplied) the United States * * *."

Cramp & Sons v. Curtis Turbine Co., 246 U. S. 28, 40, 38 S. Ct. 271, 62 L. Ed. 560.

The United States is a necessary party here for the decree sought would compel the payment of money out of the Treasury of the United States [2]; or compel the sovereign to perform specifically its contract.[3] For if the plaintiff were to prevail the defendant Forrestal would be compelled to pay money out of the Treasury, the decree thus [fol. 108] in effect compelling specific performance on the part of the Government of *its contract*. Thus, the United States is a necessary party, and the suit is as a consequence, one against the United States and one over which this court has no jurisdiction.

We are not unmindful of the decision of a similar statutory court in this jurisdiction in Lincoln Electric Co. v. Knox, 56 Fed. Supp. 308. It is to be noted however, in that case that the court said "* * * the right of the United States to withhold money owing to Lincoln is unaffected by anything which is asked for here * * *." And there is no claim here that the defendant Forrestal (Knox) has the right to interfere with the contractual relationship existing between the complainant and its customers.

The present case can be distinguished further from the Lincoln case supra, in that, as has been indicated, the relief here sought would compel the payment of money out of the Treasury, which of course demands as a prerequisite that the United States be made a formal party.

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[2] Haskins Bros. & Co. v. Morgenthau, 66 App. D. C. 178, 181, 85 F. 2 677, 680, *cert. denied*, 299 U. S. 588; Cummings v. Hardee, 70 App. D. C. 18, 21, 102 F. 2 622, 625.

[3] United States, ex rel., Shoshone Irr. Dist. v. Ickes, 63 App. D. C. 167, 169, 70 F. 2 771, 773, and cases cited.

Disposing thus as we must, and have, of the jurisdictional question *in limine* raised, relative to the others we express perforce no opinion.

Motion to dismiss granted. Counsel will prepare proper order.

(Signed.) Matthew F. McGuire.

I concur.

(Signed.) Justin Miller.

3/15/45.

[fol. 109] CONCURRING OPINION

BAILEY, J.:

Inasmuch as the defendant has filed an affidavit stating that he has suspended payment of a sufficient amount of money to cover the full amount of net refund due under the Renegotiation Act and that there is no possibility that at any time in the future he will or can proceed to collect, by withholding or otherwise, any further sum from plaintiff on account of excess profits realized during its fiscal years 1941 and 1942, the right of the defendant to prevent or endeavor to prevent any prime contractor or subcontractor of the plaintiff from paying any sums due to the plaintiff is not involved in this suit.

Apart from this question, the action is one in which the United States is a necessary party and I concur in the opinion that this Court is without jurisdiction for that reason.

(Signed) Jennings Bailey.

I concur.

(Signed) Justin Miller.

I concur.

(Signed) Matthew F. McGuire.

3/15/45

[File endorsement omitted.]

[fol. 110] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER OF DISMISSAL—Filed April 9, 1945

This cause having come on to be heard before a three judge statutory court on December 18, 1944 upon the motion of defendant Forrestal to dismiss and/or for summary judgment, and counsel for defendant having been heard in support of said motion, and counsel for plaintiff having been heard in opposition thereto;

Now upon said motion, upon the affidavit of James V. Forrestal, sworn to December 8, 1944, heretofore filed in support of said motion, upon the affidavit of J. F. Beggy, sworn to December 14, 1944, heretofore filed in opposition to said motion, and upon the complaint and answer heretofore filed, due deliberation having been had thereon, it is

Ordered that the complaint be and it hereby is dismissed on the grounds set forth in the opinions filed herein March 15, 1945.

Justin Miller, Associate Justice, U. S. Court of Appeals for the District of Columbia. Jennings Bailey, Associate Justice, U. S. District Court for the District of Columbia. Matthew F. McGuire, Associate Justice, U. S. District Court for the District of Columbia.

Approved as to form:

Charles Effinger Smoot, Attorney for Plaintiff.

Francis M. Shea, Assistant Attorney General; Edward M. Curran, United States Attorney, Attorneys for Defendant.

Dated: April 9, 1945.

[fol. 111] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR APPEAL FROM DISTRICT COURT TO SUPREME COURT—Filed May 1, 1945.

The plaintiff, Mine Safety Appliances Company, by its attorneys below named, feeling itself aggrieved by the order of the court entered herein on the ninth day of April, 1945, for the reasons set forth in its assignment of errors which is filed herewith, hereby prays an appeal from such order, to the Supreme Court of the United States; and further prays that citation be issued as provided by law; that an order be entered fixing the amount of bond and security to be given by the plaintiff as appellant and conditioned as the law directs and that a transcript of the record on appeal be certified and sent to the Supreme Court of the United States.

Mine Safety Appliances Company, by W. Denning Stewart, Howard Zacharias, Charles Effinger Smoot, Attorneys for Plaintiff, 912 American Security Building, Washington, D. C.

Served a copy of the within above petition on James V. Forrestal by serving Commdr. H. C. Johnson, T. A. G. office personally 5-3-45.

C. Michael Kearney, U. S. Marshal in and for the District of Columbia, by T. R. East, Deputy U. S. Marshal. OR.

[fol. 112] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS—Filed May 1, 1945

Mine Safety Appliances Company, appellant herein, assigns as error, in support of its appeal herein, the following:

1. The Court below erred in entering its order dismissing the complaint in the above-entitled cause.

2. The Court erred in dismissing the complaint without determining the questions of the constitutionality of the statute involved in this cause (the Renegotiation Act) and/or whether the defendant herein had exceeded his statutory authority.

3. The Court erred in taking into consideration the answer of defendant in determining defendant's motion to dismiss.

4. The Court erred in taking into consideration the affidavits in determining the motion to dismiss.

5. The Court erred in taking into consideration on the motion to dismiss any facts other than those alleged in the complaint.

6. The Court erred in passing upon the question of the United States being an indispensable party to the action, said question being one of defense and therefore not properly raised by a motion to dismiss.

Personally served copy of the within assignment of errors on James V. Forrestal, by serving Commdr. H. C. Johnson, T. A. G. office 5-3-45.

C. Michael Kearney, U. S. Marshal in and for the D. of C., by T. R. East, Deputy U. S. Marshal. OR.

[fol. 113] 7. The Court erred in not holding the Renegotiation Act to be in violation of the Fifth Amendment to the Constitution of the United States in that it authorizes appointed executive or administrative officers to take appellant's property without paying just compensation thereof.

8. The Court erred in not holding the Renegotiation Act to be in violation of the Fifth Amendment to the Constitution of the United States in that it enables appointed executive officers to repudiate valid existing contracts of plaintiff with the United States and thereby to take appellant's property without due process of law.

9. The Court erred in not holding that the Renegotiation Act violates Article I Section 1, Article I Section 8, Clause 18 and Article III Section 1 of the Constitution of the United States in that it delegates legislative and judicial functions to appointed executive officers without standards.

10. The Court erred in not holding that the Renegotiation Act in effect illegally delegates to appointed executive of-

ficers the power of levying such taxes as in their unrestricted opinions should be imposed and upon such groups of citizens as in their unrestricted opinions should pay such taxes.

11. The Court erred in not holding the Renegotiation Act to be unconstitutional as lacking procedural due process.

12. The Court erred in failing to hold the Renegotiation Act to be unconstitutional as applied to the facts of this case.

13. The Court erred in not holding that the facts alleged in the complaint disclosed that the actions of defendant and his subordinates were arbitrary and discriminatory and lacked procedural due process and were therefore unconstitutional.

[fol. 114] 14. The Court erred in holding there was no property right in plaintiff in its valid contracts with the United States and the right to be paid therefor in accordance with their agreed terms.

15. The Court erred in holding that there was no tortious invasion of plaintiff's property rights by the acts of defendant in excess of his lawful authority.

16. The Court erred in holding that the relief sought by plaintiff was that of specific performance of its contracts with the United States, or performance of obligations of the United States.

Wherefore the plaintiff, Mine Safety Appliances Company, prays that the order of the District Court of the United States for the District of Columbia appealed from herein, be reversed.

Mine Safety Appliances Company, by W. Denning Stewart, 1017 Park Building, Pittsburgh, Pennsylvania; Howard Zacharias, 1103 Law and Fiance Building, Pittsburgh, Pennsylvania; Charles Effinger Smoot, 912 American Security Building, Washington, D. C., Its Attorneys.

[fols. 115-124] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ALLOWING APPEAL—Filed May 1, 1945

It appearing to the court that the plaintiff, Mine Safety Appliances Company, has filed its petition for appeal to the Supreme Court of the United States, and has filed therewith its assignment of errors, and also its statement as to the jurisdiction of the Supreme Court of the United States, as required by Rule 12 of the Supreme Court Rules, duly disclosing that the Supreme Court of the United States has jurisdiction upon appeal to review the order in question,

It is ordered that the appeal prayed for be and the same is hereby allowed and granted to the Supreme Court of the United States from the order rendered in this cause on the ninth day of April, 1945; and it is

Further ordered that the clerk of the said court shall prepare and certify a transcript of the record, proceedings, and order in this cause, and transmit the same to the Supreme Court of the United States so that he shall have the same in the said court within 30 days of this date; and it is

Further ordered that plaintiff give a bond with good and sufficient security in the sum of two hundred and fifty Dollars ($250.00), that it as appellant shall prosecute its appeal to effect, and answer all costs if it fails to make its appeal good.

Dated, May 1st, 1945.

Jennings Bailey, Justice.

Personally served copy of the within order on James V. Forrestal by serving Commdr. A. C. Johnson, J. A. G. Office 5-3-45. C. Michael Kearney, U. S. Marshal in and for the D. of C.

By T. R. East Deputy U. S. Marshal O. R.

[fol. 125] IN THE SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS INTENDED TO BE RELIED UPON AND DESIGNATION OF PARTS OF THE RECORD TO BE PRINTED—Filed May 26, 1945

The appellant in the above-entitled case states that the points upon which it intends to rely in this court in this case are as follows:

1. The Court below erred in entering its order dismissing the complaint in the above-entitled cause.

2. The Court below erred in dismissing the complaint without determining the constitutionality of the statute involved in this case—the Renegotiation Act of April 28, 1942 as amended.

3. The Court below erred in failing to hold the aforesaid Renegotiation Act unconstitutional.

a. The aforesaid Renegotiation Act is in violation of the Fifth Amendment to the Constitution of the United States in that it authorizes appointed executive or administrative officers to take appellant's property without paying just compensation therefor.

b. The aforesaid Renegotiation Act is in violation of the Fifth Amendment to the Constitution of the United States [fol. 126] in that it enables appointed executive officers to repudiate valid existing contracts of appellant with the United States and others and thereby takes appellant's property without due process of law.

c. The aforesaid Renegotiation Act violates Article I Section 1, Article I Section 8, Clause 18 and Article III Section 1 of the Constitution of the United States in that it delegates legislative and judicial functions to appointed executive officers without standards.

d. Insofar as the aforesaid Renegotiation Act delegates to appointed executive officers the right of summary seizure of property of appellant, it violates Article III, Section 1, of the Constitution of the United States in that it delegates judicial functions and is in violation of the Fifth Amendment in that it authorizes the seizure of the property of appellant without first having afforded appellant due process of law.

e. The aforesaid Renegotiation Act in effect delegates to appointed executive officers the power of levying such taxes as in their unrestricted opinions should be imposed and upon such groups of citizens as in their unrestricted opinions should pay such taxes, contrary to Article I Section 1, Article I Section 8, Clause 1, and the Sixteenth Amendment to the Constitution of the United States.

f. The aforesaid Renegotiation Act is unconstitutional as lacking procedural due process, there being no provisions for a hearing or findings of fact.

4. The Court erred in failing to hold the aforesaid Renegotiation Act to be unconstitutional as applied to the facts of this case.

5. The Court below erred in dismissing the complaint without determining whether the appellee herein had exceeded his lawful authority.

[fol. 127] 6. The Court below erred in not holding that the facts alleged in the complaint disclosed that the actions of appellee and his subordinates were arbitrary and discriminatory and lacked procedural due process and were therefore unconstitutional.

7. The Court below erred in taking into consideration on the appellee's motion to dismiss:

a. Any facts other than those alleged in the complaint.

b. The answer.

c. Affidavits.

8. The Court below when considering the appellee's motion to dismiss, erred in passing upon the question of the United States being an indispensable party to the action, said question being one of defense and therefore not properly raised by a motion to dismiss.

9. The Court below erred in holding that it was without jurisdiction of this case.

10. The Court below erred in holding that the United States was an indispensable or necessary party to this suit.

11. The Court erred in holding that the relief sought by appellant was that of specific performance of its contracts

with the United States, or performance of obligations of the United States.

12. The Court erred in holding, in effect, that there was no property right in appellant in its valid contracts with the United States and the right to be paid therefor in accordance with their agreed terms.

13. The Court erred in holding that there was no tortious invasion of appellant's property rights by the acts of appellee in excess of his lawful authority.

14. The Court erred in holding that the case involves the right to monies in the Treasury of the United States.

[fol. 128] 15. The Court below erred in holding that the relief sought or, on the facts in this case, the relief to which the appellant may be entitled would affect the substantial interests of the United States.

16. The Court below erred in holding that there is no possibility that this suit will involve any amounts other than those represented by vouchers on which payment has been suspended.

17. The Court below erred in holding that this suit does not involve appellant's right to prevent the appellee from instructing appellant's customers to withhold amounts otherwise due appellant.

The appellant further states that only the following parts of the record as filed in this court need be printed by the clerk for the hearing of the case:

Title of Paper	Record Pages
Complaint	1–18
Stipulation Suspending Payment and Intermediate Action	19–20
Answer	25–43
Application for Designation of Three-Judge Court	44
Order Designating Three-Judge Statutory Court	45
Stipulation with Respect to Death of Frank Knox	46–47
Order for Substitution of Party	48
Motion to Set Case for Hearing	50
Affidavit of Charles Effinger Smoot	51–53
Copy of docket (or minute) entry of November 20, 1944	53

Title of Paper	Record Pages
Motion of Defendant to Dismiss Complaint and for Summary Judgment with attached Affidavit and Exhibit	54–63
Affidavit of J. F. Beggy with letter	64–68
Order of Dismissal entered April 9, 1945	69
[fol. 129] Petition for Appeal from District Court to Supreme Court	70
Assignments of Errors	71–73
In the Statement as to Jurisdiction,	
Appendix A. The Renegotiation Statutes	94–99
Appendix B. Opinion in the District Court by McGuire, J.	100–108
Appendix C. Opinion in the District Court by Bailey, J.	109
Order allowing Appeal	116

W. Denning Stewart, Howard Zacharias, Charles Effinger Smoot, Counsel for Appellant.

Receipt is hereby acknowledged this 26 day of May, 1945, of a copy of the above statement and designation of the record.

Hugh B. Cox, Acting Solicitor General of the United States, Counsel for Appellee.

[fol. 129½] [File endorsement omitted]

[fol. 130] SUPREME COURT OF THE UNITED STATES

ORDER NOTING PROBABLE JURSDICTION, ETC.—June 11, 1945

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted. Counsel are requested to discuss in their briefs and on oral argument the questions whether this is a suit against the United States and whether the complaint states a cause of action in equity. The Court does not desire to hear argument upon any other question not passed upon by the District Court. Counsel will be free to discuss in their briefs and upon oral argument the failure of

appellant to proceed before the Tax Court as provided in section 403 (e) of the Renegotiation Act of 1942 as amended, 50 U. S. C. app., Supp. IV, sec. 1191 (e).

Endorsed on cover: File No. 49716. District Court of the United States for the District of Columbia. Term No. 71. Mine Safety Appliances Company, Appellant, vs. James V. Forrestal, Secretary of the Navy. Filed May 12, 1945. Term No. 71, O. T. 1945.